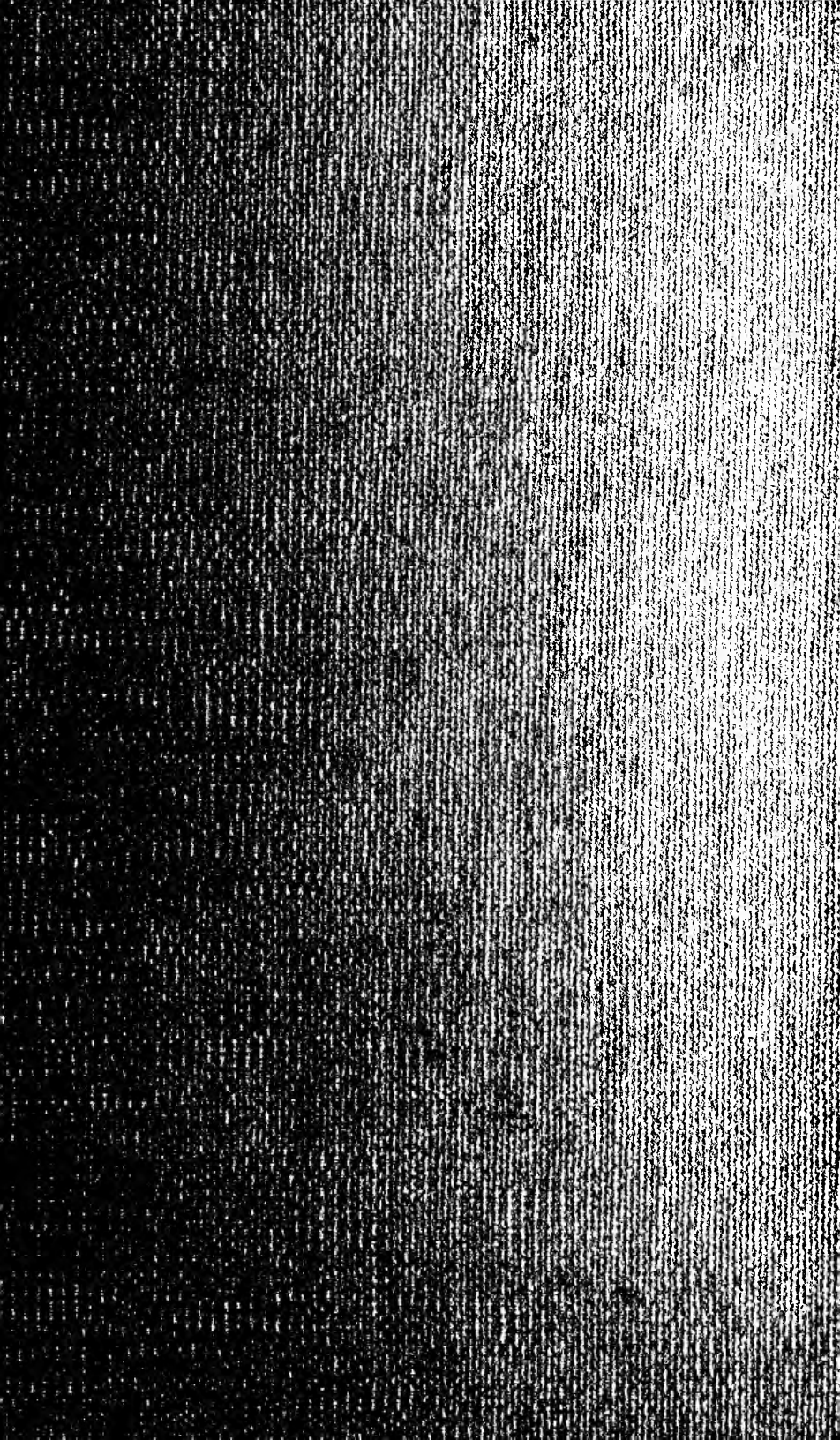

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ILLINOIS STATE UNIVERSITY
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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,
COUNSELOR AT LAW.

VOLUME XLIII.

CONTAINING THE REMAINING CASES DECIDED AT THE JANUARY TERM, 1867, A PART OF THOSE DECIDED AT THE APRIL TERM, 1867, AND AN OMITTED CASE DECIDED AT THE APRIL TERM, 1866.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. PINKNEY H. WALKER, CHIEF JUSTICE.

HON. SIDNEY BREESE,
HON. CHARLES B. LAWRENCE, } JUSTICES.

ATTORNEY-GENERAL,*

ROBERT G. INGERSOLL, ESQ.

* Under the provisions of the act of February 27, 1867, creating the office of Attorney-General, ROBERT G. INGERSOLL, Esq., was nominated by the Governor, and, by and with the advice and consent of the Senate, appointed to that office, to continue therein during the residue of the term of the then present Governor, and until his successor should be elected and qualified.

292686

PRACTICE IN THE SUPREME COURT.

CROSS ERRORS ALLOWED TO BE ASSIGNED IN ALL CASES.

AN ACT in relation to Practice in the Supreme Court.

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that in all cases taken to the Supreme Court of this State, by appeal or writ of error, the appellee and defendant in error shall have the right to assign cross errors; and it shall be the duty of said court to proceed in the disposition of such cases in the same manner as when cross errors are assigned by consent.

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved March 26, 1869.

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CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

SECOND GRAND DIVISION.

JANUARY TERM, 1867.

EDWIN S. NORFOLK *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RECOGNIZANCE — *sci. fa.* — *continuance.* In case a term of court is not held at the regular time, recognizances, like other proceedings, stand continued to the next term.

2. SAME — *demurrer* — *terms of court.* A demurrer to a recognizance only reaches matters appearing upon the record, and not matters outside of and not presented by it. The court cannot know judicially, on a demurrer, that a regular term of court was not held, or that a Special Term was held. The terms being fixed by law, it will be presumed they were held, and if not, the fact should be averred and proved, and so of holding a Special Term.

3. SAME — *forfeiture.* Under our statute the people are not bound to take a forfeiture at the first term, but if it is continued, a forfeiture may be had at a subsequent term. If the sureties wish to terminate their liability they have the power to do so, by surrendering their principal at the return term or in vacation. If court is not held at the term to which the recognizance is returnable, or if the cause is continued, a forfeiture may be subsequently had, and such an objection is not ground of demurrer.

WRIT OF ERROR to the Circuit Court of the county of Cumberland; the Hon. HIRAM B. DECIUS, Judge, presiding.

On the 16th day of February, 1865, Arthur Teader, with Edwin S. Norfolk and Benjamin G. Glenn, his bail, entered into a recognizance, for his appearance at the next term of the Circuit Court of Cumberland county, to be held in the ensuing month of March, to answer to a charge of larceny. It was duly approved and filed in the office of the circuit clerk, on the day it was executed.

Court was not held at the March Term, 1865, but a Special Term was held in the month of July, but no steps seem to have been taken in the case at that term. At the regular September Term, 1865, Teader was called and failed to appear, and the securities were called to produce their principal, but they severally failed, and a judgment by default was rendered against Teader and his sureties for the sum of two hundred and fifty dollars each, the sum named in the recognizance, and a *scire facias* was awarded to show cause why execution should not be had of the judgment.

A writ of *scire facias* was issued, returnable to the next term, and was served on Norfolk, but Teader and Glenn were not found. At the return term of the *sci. fa.* Norfolk and Glenn filed a demurrer to the *scire facias* which the court overruled, and defendants failing to plead, the court rendered a judgment against Norfolk and Glenn, to reverse which they now prosecute this writ of error.

Mr. JOHN SCHOLFIELD, for the plaintiffs in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is urged, that this judgment is erroneous, because a forfeiture was not taken at the term to which the accused was recognized to appear. That term was not held, and unless in such cases this proceeding, like others, stands continued, there is no authority to render a judgment of forfeiture. The third

section of the chapter entitled "Courts," (R. S. 143) declares, that, if from any cause the court shall not sit at any term, or shall not sit until all of the business of the term shall be disposed of and determined, all matters and causes pending in the court and undetermined, shall stand continued until the next succeeding term. This was most undoubtedly such a matter or cause as stood continued, under the provisions of this section.

The case, then, stood on the docket for trial, in precisely the same condition as other undisposed of causes. The demurrer only questions the sufficiency of such matters as appear upon the record itself, or such as are necessarily implied by the law. This *scire facias* shows the examination of the accused by a competent court of inquiry, the execution of the recognizance, its becoming a matter of record, and its forfeiture, at a regular term of the court. It, however, fails to aver that there was no March Term held in that year. Nor does it show that there was a July Special Term. The averment is, that a default was entered at the September Term, 1865. The regular terms of the Circuit Courts are fixed by law, and the courts in the State are bound to judicially know when they are required to be held, and, as the duty of holding them is imposed by law, the presumption will be indulged, that they were held at the time required, unless it is rebutted.

The court cannot judicially know that a regular term was not held, or that a Special Term had been called, and held in any circuit. They are facts that are not presumed to exist, and, although liable to occur, must be averred and proved when they do exist. This being so, the question is then fairly presented, whether the people were bound to take a forfeiture at the first term of the court held after the recognizance was executed. It seems, at the common law, to have been the practice to require the forfeiture to be taken on the day the accused was recognized to appear, or, at least, during the term. And, if our statute has not changed the practice, such might be held in our courts to be required. But, by the tenth section of the act entitled "Courts," before referred to, it is declared, that, if

the court shall fail to sit the whole of the term, and matters and causes pending in the court are not determined, or if all matters and causes are not determined at the end of the term, such matters or causes are declared to be continued to the next regular term. This case, being a cause, and pending and undetermined at the end of the March Term, fell fully within the provisions of the act, and was thereby continued till the next regular term, at which time the forfeiture was declared. It follows that the forfeiture was regularly taken, and the court committed no error in overruling the demurrer.

If the securities wished to release themselves from further liability, they only had to surrender their principal. This they could have done at any time, either in term or vacation. The continuance could, therefore, produce no injury to the bail, as they, if unwilling to be longer bound, could at the regular term or in vacation, before or after that time, have surrendered him to the sheriff. Having failed to do so, and the recognizance being an undetermined matter in court, it was continued, and the liability of the bail unaffected.

The judgment of the court below must be affirmed.

Judgment affirmed.

Murray McConnel
v.
Jairus Kibbe.

Partition — *estates subject to.* To be the subject of partition under our statute, an estate must be held jointly, in common, or in coparcenary. Premises belonging in severalty to two, and no portion of them belonging jointly to both, are not subject to partition under our statute, or under any proceeding known in courts of equity.

Writ of Error to the Circuit Court of Morgan county; the Hon. D. M. Woodson, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Mr. M. McConnel, plaintiff in error, *pro se.*

Mr. H. B. McClure, for the defendant in error.

Mr. Justice Breese delivered the opinion of the Court:

This was a bill in chancery exhibited in the Morgan Circuit Court by Murray McConnel, complainant, against Jairus Kibbe, defendant, for partition of a certain house and lot of ground in Jacksonville, in that county. The cause proceeded to a final hearing on the bill, answer and testimony, resulting in a decree dismissing the bill. To reverse this decree, this writ of error is prosecuted by complainant.

The nature of the controversy will be understood from a brief statement of the leading facts.

The property in question was a large two story brick building, and an L, once used as a hotel, and known as "The Morgan House." Kibbe purchased it of one Davenport, who had purchased it at a sale made by William Thomas, the master in chancery of Morgan county, acting under a decree of the Circuit Court of that county. Prior to the execution of the deed to him by the master, Kibbe sold to McConnel designated portions of the building, and, by arrangement between them, the master executed to McConnel a separate deed to him for his portion, and a separate deed to Kibbe for the portion he retained.

To ascertain precisely the rights of these parties, and what interests they respectively hold, resort must be had to these deeds.

In the deed to Kibbe, it is recited, that "said Kibbe retains of the purchase made by him of Davenport, the following parts of the said premises: First, the ground on which the main building of the Morgan house stands, and the said house up to the second story, as it now stands, said story being ten feet high, more or less, from the ground floor to the center of the joists of the second floor," the ground is then described by metes and bounds, "and which said ground is retained by said Kibbe, the said McConnel having the right to use and occupy forever,

the cellar under the west side of the said main building, and to pass to and from the same by passages and doors now in use, as well as such passages and doors as he may hereafter make; second, Kibbe retains the ground on which that part of the (L) ell to the Morgan house stands, which was purchased, and the building up to the second story as it now stands, the said story being nine feet high, more or less, from the ground floor to the middle of the joists of the second floor, said ground is bounded as follows," etc., here follows the boundaries: "third, Kibbe retains the right to use the well on the premises, and of having access to the same from his premises forever, and also, the right to use the passages opened, and to be opened, through and around the premises for the use of all the owners of the property purchased of said Davenport, as hereinbefore stated; fourth, the right of way three feet wide, and not less than seven feet high between the brick wall last named, and the north wall of the main building of the Morgan house; fifth, the right of way three feet wide, on the west side of the (L) ell, extending from the center of the brick wall on the north line of the purchase from Davenport to the north line of the main building, and, the said Kibbe having complied with the terms of sale," etc., "the said Thomas, in consideration of the premises, and by virtue of the power vested in him by the said decree, does hereby grant, bargain, sell and convey unto the said Kibbe, the parts of the said premises retained by him as aforesaid, together with the appurtenances thereof, subject, however, to a vendor's lien, etc. To have and to hold the said premises to him the said Kibbe," etc.

The deed from the master in chancery to McConnel, describes his interest, after reciting the above provisions in the deed to Kibbe, as follows: "And said Kibbe, subsequently, sold to said McConnel, the following parts of the premises, purchased by him as aforesaid, at three thousand dollars, payable to the owner of the premises, as part of the purchase money, payable to (by) said Kibbe, as aforesaid, viz., the ground and premises following: first, beginning at the north-east corner of the main building of the Morgan house fifty feet, more or less north of the south-east corner of said lot sixty-one, running

from thence north eleven feet fourteen inches, more or less, to the center of a brick partition wall, running east and west, thence west thirty-one feet six inches, thence south eleven feet fourteen inches, more or less, to the wall of the main building of the Morgan house, and thence east to the beginning, subject to a right of way, which is hereby reserved, for a passage, three feet wide, and not less than seven feet high, from the door in the south end of the kitchen to the north end of the main building, which is to be opened, and kept open, so that it may be used as a passage at all times forever; second, the right of way for a passage, three feet wide on the west side of the west line of the aforesaid eleven feet fourteen inches, extending the whole breadth thereof, also, a right of way three feet wide, extending twenty-one feet north, from the north end of the last named passage, which two passages, three feet wide as aforesaid, are to be kept open, and used in common by all of the owners of the property purchased by said Davenport, as aforesaid; third, the right of way for a passage, three feet wide, from the termination north of the last named passage to the north end of lot sixty-one, by the lines and courses set out in this deed in describing the property purchased by said Kibbe, which last named passage, by the lines and courses aforesaid, is granted to said McConnel, and his heirs and assigns; fourth, the use of the cellar forever under the west side of the main building of the Morgan house, and the right of passing to and from the same by doors and passages now in use, as well as such other doors and passages as said McConnel may hereafter make; fifth, the Morgan house, and that part of the L to the same, purchased by said Kibbe above the first story of each building, as they now stand, the first story of the Morgan house being ten feet high, more or less, from the ground floor to the middle of the joists of the second floor, and the first story of the ell, being nine feet high, more or less, from the ground floor to the middle of the joists of the second floor, said McConnel to have, use, and occupy the said building above the first stories, aforesaid, forever, and, in case of the destruction of the said buildings, or either of them,

said McConnel to have the right to make and continue up walls upon walls, which may be made for any new building to any height consistent with the safety of the building; which said premises, being purchased by said McConnel, as aforesaid, he, the said McConnel, pays the sum of seven hundred and fifty dollars of the purchase money, payable by said Kibbe, and executes three promissory notes, etc., and agrees that a vendor's lien be retained upon the premises purchased by him for the payment of said promissory notes. Wherefore, in consideration of the premises, and by virtue of the power vested in him by the decree herein recited, he, the said Thomas, does hereby grant, bargain, sell and convey unto him, the said McConnel, the ground and premises sold to him by said Kibbe, as hereinbefore described, together with the appurtenances thereof, subject to a vendor's lien, etc. To have and to hold the same unto him, the said McConnel, and his heirs and assigns forever."

The parties went into possession of their respective portions, and were so in possession at the time of filing the bill of complaint. Kibbe commenced making alterations in his portion of the building, consisting chiefly in the removal of a partition wall, which divided his part into two rooms, so as to make one large store-room for the sale of goods and merchandise, leaving portions of this wall standing to support the upper floors. McConnel, also, made alterations to suit his fancy in the upper rooms. McConnel complained that the removal, by Kibbe, of this wall caused his portion of the building to settle to his injury, and for that he brought an action at law, and, having failed to recover, he brought the record to this court, and the judgment was affirmed. 33 Ill. 175.

The condition of the property being so anomalous, and causing much irritation and litigation between the parties, McConnel proposed to have the property valued, and he would give Kibbe his share of the valuation, or would take from Kibbe his own share of the valuation, so that the property might be the exclusive property of one or the other; or that a sale should be made, and the proceeds thereof divided accord

ing to their respective interests in the property, both which propositions Kibbe declined.

McConnel then filed this bill for a partition, which, on the hearing, was dismissed, for the reason that a court of chancery had no jurisdiction of the subject, there being no joint estate in the property shown, but a separate estate, in separate and distinct parts thereof, as shown by the deeds of the master in chancery.

It is contended by the counsel for the defendant in error, that, inasmuch as there is no joint estate, and no joint possession, or right to possession, of the parts of the lot and house conveyed by the master, there can be no division or partition, and all questions arising between the parties, in regard to their respective rights in the lot and house, are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land; and he insists that the bill is founded on the novel idea of compulsory fusion of estates by the power of the court, to be followed by a sale, and finally by a distribution, and *that* to be made upon principles as novel as the project of fusion, for which, he insists, there is no authority or precedent.

On the other hand, the plaintiff in error claims that all men have a legal right to a partition of property held jointly, and on this idea he says his bill is based.

Admitting this proposition, which is made by complainant the foundation of his claim, this case must fall to the ground, for the fact is undeniable that the estates created by the master's deeds are not joint, but several. Portions of the premises particularly described belong in severalty to each of these parties, and no portion of it jointly to both. They have a common property in the easements and walls, but no such interest as is susceptible of division under our statute regulating the partition of estates, or under any proceeding known in courts of equity, for they parcel out such estates only as are held jointly, in common or in coparcenary.

The complicated nature of these several holdings as shown in the bill, and the litigation to which they have given rise.

and may hereafter prompt, is unfortunate, perhaps, for both parties, but we are not aware of any principle of law or equity which can compel either party to dissolve the connection, or to part with his separate portion of the premises.

We are satisfied neither a court of law nor equity has jurisdiction over the case as presented by these pleadings, and accord with appellee in the proposition that no power exists to compel the fusion of these estates, to be followed by a sale and finally by a distribution of the proceeds. The idea of the plaintiff in error that he and the defendant in error hold this property jointly, is not supported by the title deeds. They are neither joint-tenants, tenants in common nor coparceners, but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change. The Circuit Court could pass no other decree than the one entered, dismissing the bill on the hearing, as to all the matters therein, except for a conveyance of the middle cellar under the Mansion house. The decree is affirmed. The abstract of plaintiff in error not having been in compliance with rule eleven of this court, and the defendant in error having furnished a full abstract, the costs of the same will be taxed against the plaintiff in error.

Decree affirmed.

ELIZABETH CAMPBELL
v.
AMY HARMON *et al.*

1. GUARDIAN — *qualification of.* Where a guardian proceeded by bill in the Circuit Court for leave to sell lands of a minor, and an exhibit filed with the bill showed an order of the probate court appointing her guardian, and reciting that she had filed her bond,—*held,* that the court may properly presume that the bond mentioned in the order of the probate court was such as the law requires.

2. NOTICE — *sufficiency of.* In an application by a guardian in the Circuit Court to sell the real estate of his ward, a notice in due form, signed in the name of the guardian by her attorney, with affidavit of the attorney showing

that he posted it in manner required by law,—*held*, sufficient; and that the attorney was a competent person to post it, and a competent witness to prove it.

3. MASTER'S REPORT—*need not contain evidence.* On a reference to the master it is not necessary that he should report the evidence. It will be sufficient to report the facts proven by the evidence produced before him. The better practice is to report the evidence.

4. PARTIES—*minors or guardian ad litem not necessary.* In proceedings by a guardian to sell real estate of his wards, the latter need not be made parties; nor is it necessary to appoint a guardian *ad litem*.

5. SALE—*when decree need not fix precise day or hour.* Under our statute it was not intended to require the court, in an application by a guardian to sell real estate of the minor, to fix the precise day or hour of sale. It is sufficient if the court in its order fixes certain reasonable limits, both as to the day and hour within which the sale shall be held, requiring the guardian to give due notice. The guardian may exercise some discretion in a mode favorable to the ward's interests.

WRIT OF ERROR to the Circuit Court of Adams county; the Hon. O. C. SKINNER, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Mr. JACKSON GRIMSHAW, for the plaintiff in error.

Mr. N. BUSHNELL and Messrs. BUCKLEY, MARCY & HUNT, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This is a writ of error, prosecuted by Elizabeth Campbell, upon a decree of the Circuit Court of Adams county, rendered in 1851, on the petition of her guardian for leave to sell certain real estate for her support and education. Waiving the question as to whether a writ of error will lie to a proceeding of this kind, we will dispose of the case on the errors assigned, as this will save parties future litigation and expense.

The first error assigned is, that it does not appear that Amy Harmon ever qualified as guardian. There was an exhibit filed with the bill showing the order of the probate court appointing her as guardian, and reciting that she had filed her bond. It is objected that the record should further show the

bond was in proper form, and for the proper amount, but the Circuit Court may properly presume, in an application of this kind, that the bond mentioned in the order of the probate court was such as the law requires.

The second error assigned is, that sufficient notice of the application for leave to sell was not given. A notice signed in the name of the guardian, by her attorney, is in the record, together with an affidavit of the attorney showing that he posted it in the manner required by law, and the court, in the order of sale, recites that the notice had been given. The attorney was undoubtedly a competent person to post the notice and a competent person to prove it, and the notice itself was in due form.

The third assignment of errors is, that there was no evidence upon which a decree could be based. The case was referred to the master to take proof "and report the facts." He reported that the facts stated in the petition were proved to be true. The material facts stated in the petition were, that the infant had no personal property, and had never had any, and no real estate paying an income sufficient for her support and education, and that she then was, and had for some time been, dependent on her guardian for support. It further appeared from the certified copy of the order of the probate court appointing the guardian, which order was made an exhibit to the petition, that the infant, at that time, was six years of age. These facts, appearing by the report of the master, justified the court in making the order of sale. It was not necessary that he should report the evidence. It was sufficient to report the facts proven by the evidence produced before him. *McClay* v. *Norris*, 4 Gilm. 370; *Brockman* v. *Aulger*, 12 Ill. 277. It is true, it would have been the better practice if he had specifically reported the facts proven, instead of reporting that the facts stated in the petition had been proven to be true, but in proceedings of this character, at that day, such a mode of making a master's report was not uncommon, and as the objection goes rather to the form than the substance, we are not inclined to reverse decrees on this ground, many years after they have

been rendered, and thereby jeopardize titles acquired in good faith under the sanction of judicial sales. While courts will be very ready to furnish ample redress to infants who have been injured by fraudulent practices on the part of their guardian, yet, where no indications of fraud appear, and the objections taken to the proceedings are of a technical and formal character, the importance of protecting titles acquired under the decrees of court is entitled to much consideration. This has been recognized by all courts, and it is more especially true in this State, where the rapid rise in the value of real estate furnishes a constant inducement to explore ancient records for the purpose of discovering technical defects.

The fourth error assigned is, that the answer of the guardian *ad litem* was improper. This was wholly immaterial, as the decree was not pronounced upon any admissions contained in his answer. In proceedings of this character, it was held in *Smith* v. *Race*, 27 Ill. 390, that the infants need not be made parties, and that the appointment of a guardian *ad litem* was unnecessary.

The fifth and sixth errors assigned are substantially like the third.

The seventh is, that the decree fixed no day for the sale. The statute was not intended to require the court to fix the precise day or hour of sale. It is sufficient if the court in its order fixes certain reasonable limits, both as to the day and the hour, within which the sale shall be held, requiring the guardian to give due notice. The guardian may thus exercise some discretion in a mode favorable to the ward's interests. In the present case, the time fixed was between the date of the decree and the next term of the court, and between the hours of nine in the forenoon and four in the afternoon, the guardian first giving three weeks' notice by publication in a newspaper of the time, place and terms of said sale. This we think sufficient. The other assignments of error are not referred to in the argument, and we find in the foregoing no ground for reversing the decree.

Decree affirmed.

Syllabus. Statement of the case.

RICHARD McDONALD
v.
THE COUNTY OF MADISON.

1 ROAD TAX — *a school director not exempt.* The law exempting a director of schools from working on the public highways does not exempt him from the payment of road taxes assessed upon his personal property. Such an exemption is neither in the letter nor spirit of the act. Road labor is not a tax, nor can road labor be construed to embrace road taxes.

2. SAME — *road tax discharged in labor.* It is the duty of the supervisor of roads to notify each person residing in his district of the amount he may discharge in road labor, and to notify him of the time and place to attend to work out his tax and the kind of tools he shall bring. But the tax payer may waive the notice, either expressly, or by acts, from which the waiver may be inferred. Until he has such notice, he is not liable to be called upon to pay the tax in money.

APPEAL from the Circuit Court of the county of Madison; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action brought by Madison county, before a justice of the peace, against Richard McDonald, to recover $4.74, the amount of road tax assessed upon his personal property. On a trial had by the justice, a judgment was rendered against the county. An appeal was prosecuted to the Circuit Court.

A trial was subsequently had on an agreed state of facts: that the tax list was regular; that defendant, when the assessment was made, was, and still is, a school director; that he was over fifty years of age; that a letter from the State Superintendent of public instruction, in which he states it as his opinion, that a school director is exempt from such taxes, is genuine, and is to have the same credit as if he made the statements as a witness on the trial.

It also appeared, that the supervisor of the proper road district received the tax list, and that he called on defendant for his road tax during the summer; that defendant refused to pay because he was a school director; that he called on defendant twice; that he said he would neither work nor pay; but he

states, that he does not remember of ordering him to work out his taxes. The court, on the facts admitted, and the evidence in the case, rendered judgment against defendant for the amount of his road tax and costs. To reverse which, he prosecutes this appeal, and assigns the rendition of the judgment for error.

Mr. Charles P. Hise, for the appellant.

Mr. David Gillespie, for the appellee.

Mr. Chief Justice Walker delivered the opinion of the Court:

The only question presented by this record is, whether a director of a public school is liable to pay a road tax on his assessable property. The last clause of section 27 of the act of February 16, 1865 (Session Laws, 125) declares, that county superintendents, trustees of schools, school directors and other school officers shall be exempted from working on the roads, and from military duty. It is under this provision that appellant claims exemption from the road tax assessed upon his property. It appears that he held the office of director of schools at the time the tax was assessed. We are at a loss to perceive how this language can be forced to bear a construction that the property of a school director shall be exempt from the burden of a road tax. The language is that he shall be exempt from labor on the roads. We can imagine no construction or interpretation that can be given to the words "labor on the roads," to make them mean "road tax." It seems to us that it would be just as reasonable to insist, that they were intended to exempt him from paying a State or county tax, from serving on juries, or the performance of any other public duty. To give the language the construction contended for, we would be compelled to pervert or give to the words entirely a new meaning and one that they have never received.

It is insisted, that appellant was not liable to pay the tax, because he was not warned to discharge it in labor, as required

by section four of the act relating to highways. (Scates' Comp. 571.) That section does require the supervisor of roads to notify each person in his district of the amount of road tax that may be discharged in labor on the road, and shall request payment in money or labor, first notifying such person of the time and place to attend and work out such tax, and the kind of tools he shall bring. This provision is peremptory in the requirement of a notice, which must be given before the tax payers can be called upon to pay it in money, unless it shall be waived. That the tax payer may expressly waive this notice none will dispute, and we think it equally clear that a waiver may be inferred from circumstances. In this case, appellant did not say, in terms, that he waived the notice, but he did say that he was exempt, and would neither pay it in money nor labor. The officer had a right to suppose he meant what he said, and to regard the notice as waived, and perfectly useless if given. By his declarations, we think appellant is precluded from being heard now to insist that he did not have the required notice.

The judgment of the court below must therefore be affirmed.

Judgment affirmed.

Michael C. McLain
v.
Westley Watkins.

Attorney and client — *when relation ends — subsequent acts of attorney.* An attorney employed to collect a debt, prosecuted suit, which resulted in a sale of land upon execution. After the time for redemption had expired, he received and paid redemption money to the plaintiff in execution, who before that time had transferred the certificate. *Held,* that the relation of attorney and client ended after the time for redemption expired, and that the attorney could do no act in the matter without new authority; *held,* also, that the attorney was liable to the defendant in execution for the money so received.

Writ of Error to the Circuit Court of Cumberland county; the Hon. Charles H. Constable, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Mr. John Scholfield, for the plaintiff in error.

Mr. H. B. Decius, for the defendant in error.

Mr. Justice Breese delivered the opinion of the Court:

This was an action of trespass on the case on promises brought to the Cumberland Circuit Court by Westley Watkins against Michael C. McLain. The declaration contained the common counts only, and the general issue was pleaded and cause tried by a jury. A verdict was found for the plaintiff for $153.40. A motion for a new trial was made and overruled, and exceptions taken and a judgment entered on the verdict, to reverse which this writ of error is prosecuted.

The facts are briefly these: Watkins' land had been sold on execution under a judgment in favor of one Monroe. Two or three days after the time for redemption had expired, Watkins offered to pay the redemption money to the clerk, Mr. Tossey The clerk told him he was not authorized to receive it, and advised him to pay it over to Monroe's attorney, who lived at Charleston, but the clerk finally consented to receive the money, and did receive it, and sent it to the defendant, who sent the clerk this receipt, which he pasted in the record:

"Received of S. D. Tossey, clerk Circuit Court, Cumberland county, Illinois, $118, money collected on redemption of lands sold in case of *Monroe* v. *Watkins*.

"Charleston, Ill., *Sept. 29th*, 1860.

"M. C. McLain, *Attorney*."

It was agreed by the parties to this suit, that, at the date of the receipt of the money by the defendant, McLain, Monroe had parted with his interest in the judgment, and that the money was not applied on the redemption of the land; that McLain paid the money to Monroe, as directed by Tossey when he sent it to him; that McLain afterward learned that the

money should have been paid to one Joshua Miller, who held the certificate of purchase. This was all the evidence.

The only question made by plaintiff in error is, was he liable on the facts proved? He contends he was not liable, — that he was acting as a mere agent in receiving the money and in paying it over according to the directions sent to him with the money.

We are not prepared to acquiesce in this view of the position of the plaintiff in error. It is not shown he was the attorney of Monroe, or had any concern with this money, yet he signs the receipt as attorney, but not of Monroe, and pays the money to a person he did not know was entitled to it, and who in fact was not entitled to it. This he did at his own risk. He should have known to a certainty, that the person to whom he paid it was the person entitled, a fact easily to be ascertained.

As the former attorney of Monroe, after the time of redemption had expired, and the land not redeemed, his power ceased as such, and he could do no act in the matter without new authority. The time of redemption having expired, new rights had accrued. He could receive the redemption money paid to the sheriff, as this court held in *Smyth et al.* v. *Harvie et al.*, 31 Ill. 62.

It is not in proof, or admitted, that the defendant in error desired or consented this money should be sent to the plaintiff in error. The import of the testimony is, that he deposited it with the clerk, to be paid to the party entitled to receive it as redemption money and would consent so to receive it. When sent to the plaintiff in error, he assumed the right to receive it without any authority in fact. We think his duty was, so soon as he received it, he should have ascertained if Monroe then had a right, and was willing, to receive the money as redemption money, and if he had not the right, by reason of his assignment, then to have returned it to the party from whom he received it.

The clerk may be in fault, but that plaintiff in error is, there seems to us no doubt. He has received defendant's money without authority, and paid it away to a person not entitled

to receive it, and he ought to respond to the defendant in error who has lost the money, and be content with his remedy against Monroe. The judgment must be affirmed.

Judgment affirmed.

WILLIAM S. FRINK, impleaded, etc.,

v.

THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE CHRISTIAN COUNTY.

WITNESS — *competency.* A person interested in establishing a liability whereby he is to be benefited cannot be a witness in that regard. He cannot be permitted to do indirectly what the law forbids to be done directly.

WRIT OF ERROR to the Circuit Court of Christian county; the Hon. EDWARD Y. RICE, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Mr. WILLIAM C. GOUDY, for the plaintiff in error.

Mr. H. M. VANDEVEER, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought in the name of the people, for the use of Christian county, against Petty, Frink and others, upon the official bond of Petty, as treasurer of the county during the year 1861. The plaintiffs put in evidence four receipts from Petty, as treasurer, to J. C. Christian, as county collector, one bearing date June 10, 1861, two bearing date October 31, 1861, and the fourth without date, all purporting to be in part payment of county revenue for 1860, and amounting in the aggregate to $1,275.61. The county record was then given in evidence, showing various settlements made by Petty of his account as treasurer, the last bearing date December 7, 1861, and showing an overpayment by him of five dol-

lars and thirty-six cents, for which an order was drawn in his favor. The county clerk testified, that, in making up this account, he charged Petty, as treasurer, with the various sums paid to him by Christian as collector, for which the latter had filed receipts, and that he had not charged him with any of the sums specified in the four receipts above mentioned. He further testified that none of these receipts were filed in the office. Petty went out of office in November, 1861. It further appeared by the county record that Christian settled his accounts as collector December 7, 1861, for the revenue of 1860; that this settlement showed a balance against him of $1,087.59, and that he discharged said balance by two payments, made, one in March and the other in June, 1862. Christian himself was then called by the plaintiffs, and he testified he paid to Petty the sums specified in the four receipts; that the balance of $1,087.59 due from himself to the county on the settlement of December 7, 1861, had been paid by him in March and June, 1862, out of the revenue of 1861, which he was then collecting, and that the amounts specified in the four receipts are now due from Petty, either to the witness or to the county, less a small credit indorsed on one of them. It further appears from the county records that Christian, who was collector both in 1861 and 1862, is a defaulter upon the collections of 1862, for the revenue of 1861, for over four thousand dollars.

On the foregoing evidence the court gave judgment for the plaintiffs for the balance appearing to be due on the four receipts. The defendants bring the record here, and assign for error, that Christian was improperly received as a witness. The error is well assigned. The judgment rendered by the Circuit Court will, when collected, liquidate that amount of Christian's defalcation to the county. This suit is, in fact, as much for his benefit as if he had been named the *cestui que use* on the record. Whatever is collected by its means goes intc his pocket, by paying his debt. It is urged, that, if the county does not collect the amount of these receipts, Christian can, and that it does not matter to him by which process the

debt is recovered. It is true, according to his evidence, the amount is due him from Petty, and might be recovered by a suit in his name, but it could not be recovered upon his own evidence, or could not have been as our statute law then stood. It is precisely for this reason, that his evidence is inadmissible here. He cannot be permitted to do indirectly what the law forbids to be done directly. He cannot, by suing in the county's name, collect his own debt through his own evidence. His interest in the result of this suit is in no sense a balanced interest.

Neither can his evidence be considered immaterial. On the contrary, his testimony was very material as explaining away the inferences unfavorable to the plaintiff, that might be drawn from his payment in March and June, 1862, as appearing on the county record, of the balance against him on the revenue of 1861. But even his evidence does not explain why he allowed that balance to be struck against him in December 1861, when, by producing the four receipts, he could have shown the county treasurer was really overpaid.

Judgment reversed.

HENRY C. WATERMAN
v.
JOHN S. DONALSON.

1. FRAUD — *sale of goods.* Fraud in the purchase of a stock of goods must be proved to subject them to the debts of the vendor. The mere fact that one of two partners said he intended to pay such debts as he could, and to "break full-handed," does not prove fraud in the sale of the goods, unless there is evidence that the purchaser participated in the fraud. And when he refused to become a sham purchaser, and refused to have any connection with the matter unless the sale was *bona fide*, in the absence of other evidence of fraud, it will not be presumed that he was guilty of fraud.

2. SAME — *adequacy of price.* Where it appears that a firm sold their stock of goods to a creditor, in satisfaction of his debt against the firm, and he was to pay other debts of the firm for the balance of the price of the stock, and

it was invoiced to him at twenty-five per cent less than it cost, it being old and broken, it will not be inferred that there was fraud. A mere doubt of the fairness of a transaction is not sufficient, but fraud must be proved by a preponderance of evidence. Nor will the court infer that such a sale is fraudulent because it is made to an uncle of one of the partners.

WRIT OF ERROR to the Circuit Court of the county of Macon; the Hon. CHARLES EMERSON, Judge, presiding.

This was an action of replevin, brought by Henry C. Waterman, in the Fayette Circuit Court, against John T. Dalton, for the recovery of a quantity of goods, wares and merchandise. The declaration was in the usual form, and the defendant filed pleas of *non cepit*, *non detinet*, property in Waterman and Anderson, and a plea justifying the taking, as sheriff of Fayette county, by virtue of certain writs of attachment in his hands against Waterman. The venue was afterward changed to the Circuit Court of Macon county. A trial was had by the court, a jury having been waived by agreement of the parties.

On the trial, it appeared that Waterman and Anderson were partners in the hardware business in Vandalia; that, on the 2d of March, 1866, David A. Waterman sold his interest in the business to plaintiff and executed a regular bill of sale; that Waterman had borrowed of plaintiff, six weeks or two months previous to the sale, one thousand dollars, which was used in the business of the firm; that the firm gave a note to Austin & Bowles, with power to confess a judgment, and plaintiff, learning that his debt was not secure, came from Ohio. At this time the sheriff had an execution in his hands against the firm for $267, in favor of Austin & Bowles. Plaintiff, after some negotiation, purchased Waterman's interest in the stock of hardware in satisfaction of his debt, and by assuming the payment of a number of debts incurred for the firm. The consideration paid and to be paid amounted to about $2,600; and it appears that the stock, at wholesale prices, amounted to about $3,500 when first purchased.

The possession of the goods was delivered to plaintiff, and the creditors of the firm afterward sued out writs of attach-

ment, which were levied upon the goods. There was some evidence tending to prove that Waterman threatened to defraud his creditors, and had proposed to plaintiff to make a fictitious sale to him, but this he persistently refused, saying if he purchased, it should be a *bona fide* transaction.

The court below found the issues for the defendant, and awarded a return of the property. To reverse that judgment, plaintiff prosecutes this writ of error.

Messrs HENRY & FOUKE and Mr. A. J. GALLAGHER, for the plaintiff in error.

Mr. J. P. VAN DORSTEN and Messrs. NELSON & ROBY, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted, that the sale from David A. Waterman and Joseph Anderson, to Henry C. Waterman was *bona fide*, and that the court below erred in finding for the defendant. That David A. Waterman was indebted to plaintiff in error, in the sum of $1,000 and interest thereon, there seems to be no doubt. And that the note was given up seems to be equally well established. Nor does there seem to be any evidence that this debt was fraudulent. It is also proved, that plaintiff in error paid to Anderson $300 for his interest. And the balance of the consideration appears to have consisted of an undertaking by plaintiff in error to pay some debts of David A. Waterman, amounting in the aggregate to the sum of $805. The interest on the note and the expenses charged for attempting to collect it was placed at $250, and the judgment of Austin and Bowles for $269, which was a lien on the goods, constituted the consideration paid for them. The bill of sale, however, from David A. Waterman to plaintiff in error, states that the consideration paid and to be paid for his interest was $2,060, which is about the sum excluding the judgment. But that

and the sum paid to Anderson added, make the entire consideration $2,629, paid for the stock of goods.

The evidence seems to establish the value of the stock of goods at about the sum of $3,549, at Chicago prices. This would be about $900 less than their true value. As to Anderson's interest, it seems that he put in as capital but $100, the rest being furnished by Waterman. It also appears that the debts which plaintiff in error assumed to pay had been incurred for the benefit of the firm, although he was individually liable for their payment.

The evidence shows that Waterman, at different times, made declarations that clearly manifested an intention on his part to defraud their creditors. He seems, before the sale, to have stated that he would pay what he could, let the other creditors go, and break full handed. After the sale was made, he stated that "men ought to be smart, like myself, and keep their money in their pockets." But we see nothing showing Anderson's intention beyond what may be inferred from the sale itself.

Nor is there any thing in the record which would implicate plaintiff in error with such a design. Henry testifies that David A. proposed to him to make a sham sale, the night it was consummated, but he refused, and stated if he purchased, it must be a *bona fide* transaction. He went into immediate possession, and continued it until the goods were attached. He canceled a note he held against the principal partner, and paid the other certainly all his interest was worth. But it is insisted that he should be charged with a fraudulent intent, because the price paid for the goods was inadequate. It is true, that, estimating them at the wholesale price for new goods, they were worth more. But the price paid was twenty-five per cent deducted from the cost price, which we are not prepared to say was grossly inadequate — so much so as to prove a fraudulent intention on the part of the purchaser.

Nor does the fact that he was the uncle of David A. Waterman prove that he intended to aid and assist him in defrauding his creditors. Relatives may undeniably trade with each

other as well as strangers. When all of the evidence in the case is considered, we do not see that plaintiff in error has acted fraudulently in making the purchase; and, unless he intended to aid the other parties in hindering and delaying their creditors in the collection of their debts, he was entitled to hold the goods. From the fact that fraud usually assumes all of the forms of fairness and good faith, it is frequently a matter of much difficulty to detect its presence. But, nevertheless, we usually expect to find in such transactions, facts and circumstances from which the mind is convinced that it does exist. In this case, the evidence fails to produce that effect. It may create a doubt of the fairness of the transaction, but that is not sufficient to overturn a sale and deprive parties of title to property which they seem to have acquired in the usual course of business.

We are, therefore, of the opinion that this case should be submitted to another jury, and the judgment is reversed and the cause remanded.

Judgment reversed

HARRISON YOUNG
v.
SARAH FOUTE.

1. EVIDENCE — *admissions.* Admissions are to go to the jury, but a party making them is at liberty to disprove them, — to show by proof *aliunde* they were not true, or made for a purpose. The jury are to determine what weight should be given to them.

2. ADMISSIONS — *when they operate as an estoppel.* Unless admissions have induced a person to act on them, and so altering his condition, they may be shown to be untrue; but, if a party has acted on them, they will operate as an estoppel on the party making them.

3. SAME — *weight to be given.* In all cases of admissions, it is for the jury to determine the weight to be given to them, for much depends on the accuracy of the memory of the witness, and the circumstances under which the admissions were made.

APPEAL from the Circuit Court of De Witt county: the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action of assumpsit, brought by the appellee against the appellant, in the Circuit Court of De Witt county.

The cause was tried by a jury, and verdict given in favor of the plaintiff for $1,150. The defendant made a motion for a new trial; whereupon, the plaintiff remitted $119 of the verdict, and the court overruled the motion for a new trial, and rendered judgment for $1,031. The cause is brought here by appeal.

The facts are fully stated in the opinion of the court.

Mr. C. H. MOORE, for the appellant.

Messrs. WILLIAMS & BURR and E. H. PALMER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit brought in the De Witt Circuit Court, to the May Term, 1866, by Sarah Foute against Harrison Young, on five promissory notes, of the date of January 1, 1856, made payable by defendant to plaintiff, and alleged to be lost. The declaration counted on each note, and there was a count on all the notes tracing their delivery to one Mastin for collection, who delivered the notes to the defendant, to be redelivered by him to the plaintiff, and a failure by him to redeliver them. The seventh count was on the note described in fifth count, due in nine years from date, for two hundred dollars, alleged to have been left, unindorsed, in plaintiff's trunk, and lost.

The eighth count was for land sold and "delivered" by the plaintiff to the defendant. A notice was served on the defendant to produce on the trial the five notes described in the declaration, all of them described as non-bearing interest notes.

The plea was the general issue with notice of set-off, accompanied by a bill of particulars.

The cause was tried by a jury, and a verdict rendered for the plaintiff for eleven hundred and fifty dollars. A motion was made for a new trial, whereupon the plaintiff remitted one hundred and nineteen dollars of the verdict, and the court overruled the motion for a new trial, and rendered judgment for the plaintiff for one thousand and thirty-one dollars.

To reverse this judgment, this appeal is taken, and it is assigned for error, that the court admitted improper evidence for the plaintiff, excluded proper evidence for the defendant, gave improper instructions for the plaintiff, refused proper instructions for the defendant, the court should have set aside the verdict, and granted a new trial, the court should have arrested the judgment, and should not have permitted one of the notes to be withdrawn after verdict and judgment upon it.

In lieu of an account, and as a basis for the eighth count for land sold and "delivered," there was filed with the declaration, what was supposed to be a record of a suit in chancery, in the Macon Circuit Court, in which the defendant was complainant, and the plaintiff and others defendants, the object of which was to obtain a decree of that court, for the specific performance of a contract made by defendant with Jacob Foute, in his life-time the husband of plaintiff, for the conveyance of a certain tract of land in that county. By this contract it appears Jacob Foute agreed to sell defendant his farm of one hundred and eighty-two acres, for which defendant agreed to pay two thousand and fifty dollars, and had paid thereon in cash, fifty dollars. The remaining two thousand dollars defendant agreed to pay as follows: one thousand dollars to the plaintiff, in payments according to the tenor, and in the amounts, of the several notes sued on, they to be without interest, and the same amount to Jacob Foute. It was agreed, that defendant should hold all the notes until he received a warranty deed for the land; when he did receive it, he was to deliver the notes to Jacob and Sarah Foute, the plaintiff. Jacob Foute having died, the bill was filed for a conveyance, and Sarah Foute, and the heirs at law of Jacob Foute, made defendants, and these notes were produced by complainant Young in court, delivered up, and a decree passed in

his favor for a deed for the land so sold, which the master in chancery of Macon county was directed to execute and deliver to Young. The notes are made an exhibit in the bill, and are the same as those described in the declaration in this cause.

The first objection made by appellant is as to the admission in evidence of these chancery proceedings. The clerk of the Macon Circuit Court certifies, under the seal of the court, that they are correct copies, as appears from the record and files of his office. We see no substantial objection to the record as evidence, for the purpose of proving what was sought to be proved by it, namely, the identity of the notes, and the fact that they were given for land sold.

Notes on Young, of the amounts specified in the declaration, were purchased by Hiram Mastin of Sarah Foute for six hundred dollars, which he agreed to secure her by his own note and a mortgage on land. When the trade was about to be consummated Mrs. Foute retracted, and told Mastin to deliver the notes to Young, and he would hand them to her. Mastin states distinctly that the notes so delivered to him bore interest from date, and consequently could not have been the notes in suit, for they bore no interest. The objection to this testimony on this point was properly overruled. It was a question of identity, and should go to the jury with the other proofs on that point. The notes thus given to Mastin he delivered to Young on Young paying him two hundred and thirteen dollars. When the notes were given to Mastin, Mrs. Foute stated that from one hundred and sixty to two hundred dollars had been paid on them, and when she declined to comply with her contract made with Mastin he told her she could not get Young's notes, to which she replied that he (Mastin) could not collect them, for she and Young had had a settlement of their accounts and she found Young had paid the notes. Mastin still holding the notes, he and Young were about to have a lawsuit about them when Young agreed to give Mastin two hundred and thirteen dollars if he would give up the notes to Mrs. Foute, which Mastin agreed to do. Mastin then asked Mrs.

Foute what he should do with the notes if he and Young settled. She said he might hand them to Young and he would bring them to her. When Young paid the two hundred and thirteen dollars he said the notes were given for land and were paid. Mastin then gave the notes to Young, and told him what Mrs. Foute said about his bringing them to her. It was sworn by McIntosh, for the plaintiff, that he heard Mrs. Foute demand her notes of Young, and Young said she could have them when she signed a deed. No particular notes or land were mentioned.

This was all the evidence for the plaintiff.

To rebut this proof, one Lowey testified for the defendant, that he was a justice of the peace, and went to Mrs. Foute with Mastin's note and mortgage, which she was to take for Young's notes, which she had let Mastin have. She refused to accept Mastin's note and mortgage, and said Young's notes were all paid off; that she and Young had settled, and Young did not owe her any thing.

One Craig stated for defendant, that in October, 1864, he was at Young's making molasses, and Mrs. Foute came out to where he was, and told him all about the difficulty between herself and Mastin and Young. She said she and Young had settled, and she owed him fifteen dollars over and above his notes, and mentioned a number of the items that Young had paid her. She said Young had supported her mostly for ten years, had paid some money for her, kept her stock, etc. This was some time after the difficulty had been settled, some two or three months, as the witness understood.

On this evidence, the court gave these instructions for the plaintiff, to which the defendant excepted:

"If the jury believe, from the evidence, that the defendant was indebted to the plaintiff for land, in any sum less than $1,600, and gave plaintiff his notes therefor, and has since himself got possession of said notes, and has not paid said indebtedness, — then they will find for plaintiff the amount shown by the evidence due for such land.

"If the jury believe, from the evidence, that the defendant was indebted to the plaintiff on the five notes in the declaration described, and has not paid said notes, and himself now wrongfully has possession of said notes, then they will find for the plaintiff the amount due on said notes.

"The court instructs the jury, on behalf of the plaintiff, that, while admissions are competent to be given in evidence against a party who makes them, they are often of an inconclusive and unsatisfactory character, depending very much on the circumstances under which they were made. It is the province of the jury to decide the weight to be given to admissions, and in so doing they have a right to take into consideration the circumstances under which they were made, and the relation and condition of the parties to such admissions, and the ability of witnesses to recollect such admissions as they were originally made.

"If the jury believe, from the evidence, that the plaintiff has admitted that the notes have been paid; yet if they further believe, from the evidence, that these admissions were made for the purpose of getting the notes back out of Mastin's hands, and that they have not in fact been paid, then they have a right, if they choose to do so, to disregard these admissions."

The court refused to give the following instructions asked by defendant, to which defendant also excepted:

"The court instructs the jury that verbal admissions of payment are good proof of payment, if the jury believe, from the evidence, that such admissions were made.

"The court instructs the jury, that if they believe, from the evidence, that Young paid Mastin a valuable consideration for the notes sued on, and for that consideration the notes were given up to Young, that is evidence tending to show that the defendant honestly came by the notes.

"If the jury believe, from the evidence, that Mrs. Foute sold these notes to Mastin, and Mastin, for a valuable consideration, gave up the notes to the defendant, the plaintiff cannot recover on the notes in this action."

The defendant also excepted to a modification made by the court to his fourth instruction given by the court as follows: "Admissions made by the plaintiff of payment by defendant are good evidence of payment, if the jury believe such admissions were made" — the modification was in the addition of the words "and were true."

The defendant also excepted to the modification to his sixth instruction given by the court as follows: "That the variance of interest from date" in the notes described by Mastin and interest from due in those in the declaration, if they believe such a variance proved is a material variance — the court added, "under the first count of the declaration."

The doctrine as to admissions of parties is correctly stated in the third of plaintiff's instructions and is in harmony with the cases adjudged in this court on that point. Admissions are to go to the jury, but a party making them is at liberty to disprove them — to show by proof *aliunde* they were not true, or made for a purpose. The jury are to determine what weight should be given to them. *Duffield* v. *Cross*, 12 Ill. 397; *Ingalls* v. *Bulkley*, 15 id. 224. Unless admissions have induced a person to act on them and so altering his condition, they may be shown to be untrue, but if a party has acted on them, they will operate as an estoppel on the party making them. *Ray* v. *Bell*, 24 Ill. 444. And in all such cases it is for the jury to determine the weight to be given to them, for much depends on the accuracy of the memory of the witness, and the circumstances under which the admissions were made. *Frizzell* v. *Cole*, 29 Ill. 465.

The court then did not err in the instructions given for the plaintiff nor in refusing those asked by the defendant as modified. Nor did the court err in restricting the proof of variance to the first counts in the declaration. Those counts were upon the notes, whereas the recovery was sought on the count for land sold, so that the variance had nothing to do with the case on that count.

But we are not satisfied with this verdict. It is questionable under the proof if the plaintiff has a right to recover at all, but

it is clear she has recovered too much, no credit having been allowed Young for the $213 paid by him to Mastin when Mastin held the notes. Nor does it appear, Young has been allowed for the amount paid on the notes before they came to Mastin's hands. If the notes are not wholly paid as Mrs. Foute said they were, it is very clear the maker has not been credited with the amounts he has paid on them. The case ought to be further investigated by another jury, and for that purpose, for the reasons given, the judgment is reversed and a new trial awarded.

Judgment reversed.

JACOB DIETRICH
v.
ALBERT A. MITCHELL.

1. ASSIGNOR—*payee who assigns in blank not a guarantor.* An indorsement in blank by the payee of a promissory note does not authorize the indorsee, or other person, through whose hands the note may pass, to write a *guaranty* over such indorsement.

2. PRESUMPTION—*from indorsement in blank.* If the name of a payee is found on the back of a note, the presumption, in this State, in the absence of proof, is, that he placed it there as assignor, with a view to assume the liabilities of an assignor under our statute. If it be sought to charge him as guarantor, the plaintiff must show, that he contracted as guarantor.

3. NON EST FACTUM—*what it puts in issue.* The plea, *non est factum*, sworn to, denying a guaranty written over the name of the assignor, who is payee, of a promissory note, puts in issue, and casts upon the plaintiff the burden of establishing, that the assignor contracted as guarantor.

4. INDORSER—*when presumed a guarantor.* A stranger, who indorses a note in blank, at the time of its execution, is presumed to indorse as guarantor.

5. PRIVILEGED COMMUNICATIONS—*what are.* An attorney cannot be compelled to testify as to whether a promissory note was indorsed when placed in his hands for collection. The privilege extends not only to what the attorney hears, but what he sees from his situation as attorney.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. D. M. WOODSON, Judge, presiding.

Statement of the case.

This was an action of assumpsit commenced to the September Term, A. D. 1865, of the Circuit Court of Morgan county by Albert A. Mitchell against Jacob H. Dietrich, as guarantor of a promissory note.

The declaration contained four counts. The first count set out a promissory note in the words and figures following:

"NAPLES, *November* 13, 1856.

"On or before the first day of March, 1858, I promise to pay J. H. Dietrich or order five hundred dollars, bearing ten per cent interest from March 1, 1857, for value received.

"JOHN C. CLIFTON."

And averred that the defendant, who was the payee therein, for value received, assigned, transferred and indorsed the same to the plaintiff in the words and figures following:

"For value received, I assign and guarantee the payment of the within note to A. A. Mitchell. Dated this fifth day of January, 1858. "J. H. DIETRICH."

It also averred insolvency of Clifton, the maker.

The second count set out the same note and assignment; averred that the assignment was made for value received; that the maker was insolvent; and that the note was not paid.

The third count set out the same note and indorsement, averred that Dietrich was liable as guarantor, and that Clifton, the maker, was insolvent, but did not aver a consideration for the guaranty.

The fourth count set out the same note and writing on the back thereof, and averred that defendant, for the sum of five hundred and forty-two dollars and thirty-three cents, paid to him at that time, guarantied the payment of said note and failed so to do.

To this declaration the defendant filed two pleas — *non assumpsit*, and *non est factum* sworn to — and the plaintiff joined issue.

A jury was summoned to try the issues, who, after hearing the evidence, returned, under the direction of the court, a verdict for plaintiff for $955.50.

The defendant moved for a new trial, which motion the court overruled, and entered judgment on the verdict. Defendant excepted.

On the trial, the plaintiff introduced two witnesses, who testified that they had known defendant for several years; had seen him write, and knew his handwriting; that the word, "J. H. Dietrich," was his handwriting, but that the writing above the name was not the handwriting of defendant.

Plaintiff then offered in evidence to the jury the note and guaranty thereon.

The defendant introduced Murray McConnel, who testified to the appearance and condition of the note while in his hands, as the attorney of plaintiff, previous to the suit.

The plaintiff objected, on the ground that his knowledge in that respect was privileged, but the court overruled the objection and admitted the testimony, to which plaintiff excepted.

The defendant also introduced a witness named J. H. Carver, and offered to prove that Clifton, the maker of the note, was in possession of a large amount of personal property long after the note became due, and after it was assigned to plaintiff. The plaintiff then entered a *nol. pros.* to the first and second counts of his declaration. Whereupon the court decided that the proof so offered was not admissible.

The defendant then moved the court to exclude the note and all writing thereon from the jury, on the ground that under the issue there was no proof of the execution of the guaranty, nor of a consideration therefor. Which motion the court overruled, and decided that the plaintiff was *not* bound to prove a consideration for the guaranty; that the plea in the case only put in issue the signature to the guaranty, and that when the defendant indorsed his name on the back of the note, and put the same in circulation, he thereby authorized any persons to whom it might come to write this guaranty over his signature.

Messrs. MORRISON & EPLER, for the plaintiff in error.

Mr. H. T. ATKINS, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit brought by Mitchell against Dietrich, as guarantor of a promissory note. The note had been given by one Clifton to Dietrich, as payee. It had been indorsed by the latter, and over his name, in a different handwriting, was written an assignment and a guaranty. He filed a plea denying under oath the execution of the guaranty. The jury found a verdict for the plaintiff, and the defendant brings up the record.

On the trial the plaintiff asked, and the court gave, the following instruction:

"2. The court further instructs the jury for the plaintiff that the plaintiff in this case, under the pleadings herein, in order to make out a *prima facie* case to entitle him to recover a verdict, is only bound on his own part to put the note in the declaration mentioned in evidence, and to prove the signature of the defendant, Dietrich, indorsed upon the back of said note, to be his true and genuine signature; and if the jury find such facts proven, and find no evidence offered on the part of the defendant, that the contract of assignment and guaranty, written on said note, over said defendant's signature, was not warranted by the agreement of the parties plaintiff and defendant herein, they will find for the plaintiff."

The defendant asked, and the court refused, the following instruction:

"2. If the jury believe, from the evidence, that the note in evidence in this case, when negotiated by defendant, was indorsed in blank by him, then it devolves upon the plaintiff, before he can recover in this case, to prove to the satisfaction of the jury, that defendant agreed to guaranty the payment of the note, or previously authorized or subsequently sanctioned the written guaranty indorsed upon the note."

The instruction given for the plaintiff should have been refused, and that refused for the defendant should have been given. If the name of the payee is found on the back of a note, the presumption in this State, in the absence of proof, is, that he has placed it there as assignor, with a view to assume the liabilities of an assignor under our statute. If it is sought to charge him as guarantor, the plaintiff must show that he contracted as guarantor. *Camden McCoy*, 3 Scam. 347; *Webster* v. *Cobb*, 17 id. 459; *Bogue* v. *Melick*, 25 id. 91; *Blatchford* v. *Milliken*, 35 id. 439. No such inference is to be drawn from the indorsement of his name in blank, as seems to be implied in the giving of one of the above instructions and the refusal of the other. And when, as in the present case, the defendant, being sued as guarantor, denies under oath the execution of the guaranty, the burden of proof is on the plaintiff. The fact that a contract of guaranty is found written above the name of the indorser, in a handwriting not his own, would not, of itself, be sufficient to raise a presumption that it was done by his authority, or that the contract was there when he wrote his name, because the presence of his name is to be accounted for by the fact, that, as payee of the note, it was necessary for him to indorse it, in order to give it negotiability. To hold that any person through whose hands a note may pass can write a guaranty over a blank indorsement and then require the indorser to disprove it, would be fruitful of fraud, and dangerous to every person who has occasion to receive and indorse a promissory note.

The case of *Hance* v. *Miller*, 21 Ill. 636, is quoted by counsel for the defendant in error as announcing a different rule. In that case there was one count against the defendant as guarantor and another against him as assignor under the statute. On the trial, the plaintiff entered a *nolle prosequi* to the count on the guaranty, and recovered under the other count by proving the insolvency of the maker. When the case came here, it was urged, if the guaranty which had been written over the name of the indorser was in fact unauthorized, the writing of such a guaranty was a fraudulent alteration of the indorse-

ment, and destroyed the validity of the assignment for all purposes whatsoever. Upon this point, the court said it would not, in the absence of all proof, presume the guaranty was unwarranted, and by such presumption vitiate the assignment, if such would be the legal effect. But to refuse to presume a guaranty to have been unauthorized, for the purpose of destroying an assignment admitted to have been executed in blank, is a very different thing from presuming the guaranty to have been authorized when a recovery is sought upon such guaranty In such cases, if the execution of the guaranty is denied under oath, the party claiming its benefit must show such a contract was really made. This has been the settled law of this State ever since the decision in *Camden* v. *McCoy*, above cited. What we here decide is, that the mere signature of the payee of a note, upon its back, does not authorize the presumption, in the absence of all proof, that he placed it there as a guarantor, nor justify the holder in writing a guaranty over the name. The second instruction asked by the defendant should, therefore, have been given, and the second given for the plaintiff should have been refused, as tending to mislead the jury. When a stranger to the note indorses it in blank at the time of its execution, a different rule of course applies. He is presumed to indorse as guarantor. This was held in the cases above cited.

As this case must be remanded for another trial, it is proper that we should dispose of another question discussed in the argument. On the trial, Mr. McConnel was called by defendant as a witness, and he testified he had brought a former suit on this same note, and when the note was in his hands, the name of Dietrich, the defendant, was indorsed on the note, but no guaranty was written above it. This evidence was objected to as falling within the rule of privileged communications between attorney and client. The objection is valid. A similar question is very fully considered in the case of *Brown* v. *Payson*, 6 N. H. 443; and, after reviewing all the authorities, the court hold, an attorney cannot be compelled to testify as to whether a promissory note was indorsed when placed in his

hands for collection. In *Robson* v. *Kemp*, 5 Espinasse, 52, Lord ELLENBOROUGH held an attorney could not be compelled to prove the destruction of a written instrument in his presence and while he was acting as attorney. "One sense," said the court, "is privileged as well as another. He cannot be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as an attorney." The pith of the question is presented in these few words. So in *Wheatley* v. *Williams*, 1 Mees. & Welsby, 541, the court held, all the judges concurring, that an attorney could not be compelled to state whether an instrument, when shown to him by his client, was stamped or not. The counsel for appellant cite *Baker* v. *Arnold*, 1 Caine, 257, as laying down a different rule. The Supreme Court of New Hampshire, *ubi supra*, in commenting on this case, point out the inaccuracy of the reporter's note, and, that RADCLIFF, Justice, alone sustained this position, while THOMPSON and LIVINGSTON, Justices, held the evidence inadmissible, and KENT, Justice, and LEWIS, Ch. J., gave no opinion on the point. The only other case cited by the counsel for appellant bearing directly on this question is, *Heister* v. *Davis*, 3 Yeates, 4, and the case is very brief and not much considered. The weight of authority is against the admissibility of the evidence, and this rule is founded in the sounder reason. If the knowledge comes to the attorney through his professional relation to his client, we cannot perceive, that it is important whether, in the language of Lord ELLENBOROUGH, it is by what he sees or what he hears. For the error in the instructions the judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

JOSEPH GARTSIDE
v.
THE CITY OF EAST ST. LOUIS *et al.*

1. INJUNCTION — *to restrain a municipal corporation.* Even if an injunction can be decreed to restrain a corporation from the abuse of its franchises, by the adoption of ordinances and acts, which will produce injury to individuals, it must appear that the acts complained of are unauthorized, injurious, and of such a character that proceedings at law will not afford adequate and full relief.

2. CITY — *its charter — license required by ordinance.* Where a city charter authorizes the common council, to direct, license and control all wagons and other vehicles carrying loads within the city, an ordinance adopted under the charter, requiring persons transporting coal in such vehicles from places within to places outside the city, to obtain a license before such transportation can be made, is not unreasonable and will be sustained if the sum required to be paid therefor is reasonable.

3. SAME — *restraint of trade.* Such an ordinance is not in restraint of trade any more than requiring pedlars, brokers, factors, ferrymen, hackmen and others, to procure a license to exercise their various callings and pursuits. They are all required to submit to reasonable exactions. The city being required to keep its streets in repair, it is but reasonable, that those who constantly use them with such vehicles should contribute to their repair, by submitting to the payment of a reasonable sum for a license.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was a suit in chancery, brought by Joseph Gartside, in the St. Clair Circuit Court, against The City of East St. Louis, to restrain the enforcement of an ordinance, requiring persons, hauling coal in wagons within the city limits, to first procure a license for the purpose. The bill alleges that the complainant was largely engaged in mining and transporting coal through the city; that it was brought by rail from the mine to the depot in the city, and thence by a number of four-horse teams and wagons, through a portion of the city to a boat on the Mississippi river, which conveyed it to St. Louis; that the general assembly, by an act adopted in February, 1865,

authorized the city of East St. Louis, to "direct, license and control wagons and other vehicles conveying loads within the city, and prescribe the width and tire of the same;" that the city adopted an ordinance by which persons, transporting stone coal from places without to places within the city, and from places within to places without the city, by wagons or other vehicles, are required to obtain a license for the purpose, and imposing a penalty for failing to comply with the ordinance; and it fixed the sum to be paid for such license at ten dollars for each vehicle drawn by more than two animals.

The bill prays an injunction to restrain the city from suing for penalties claimed to have been incurred by a failure by complainant to obtain licenses for his various teams thus employed. A temporary injunction was granted by the master in chancery. Defendant filed a demurrer to the bill, which, on being heard by the court, was sustained, and a decree rendered dismissing the bill. Complainant thereupon prayed an appeal, and brings the case to this court and assigns for error the dismissal of his bill.

Mr. W. H. UNDERWOOD, for the appellant.

1. An injunction lies to restrain a municipal corporation against an abuse of its franchise which would occasion a permanent injury to an individual, to prevent a multiplicity of suits, or where it is acting without authority of law. *Hill* v. *Commissioners, etc.*, Parsons, Eq. C. 507; *Oakley* v. *Trustees, etc.*, 6 Paige Ch. 262; *Keene* v. *Bristol*, 26 Penn. St. 46; *Smith* v. *Bangs*, 15 Ill. 400; *C. R. R. Co.* v. *McLean Co.*, 17 id. 291; *Chicago, etc.*, v. *Frary*, 22 id. 37; *Ottawa, etc.* v. *Lindley*, 21 id. 605; *Shute* v. *C. and M. R. R. Co.*, 26 id. 436; *Davis* v. *Mayor, etc.*, 1 Duer, 451; 2 Story's Eq. Jur. §§ 927, 928; *Baldwin* v. *Buffalo*, 29 Barber, 396; *People* v. *New York*, 32 id. 35; *Brandenburgh* v. *Baker*, 32 Ill. 184; *Toledo, etc.*, v. *Lafayette*, 22 Ind. 263; *Miller* v. *Gorman*, 38 Pa. St. 309; *Wood* v. *Draper*, 24 Barb. 187.

2. A license is authority to do what would be otherwise unlawful. Surely it is not unlawful for a man to haul his

property out of the city of East St. Louis! Nor is hauling one's own coal with one's own team a "franchise or privilege" that may be licensed under section 2, article 9 of our State Constitution. See *People* v. *Thurber*, 13 Ill. 555, 2 Black. Com. 37. A franchise or privilege is a peculiar benefit or advantage conferred on some persons beyond the common advantages of other citizens. 1 Black. Com. 271, 372; Webster's Dictionary, title "Privilege."

3. The power to pass such ordinances is in restraint of trade and should be strictly construed. *Dunham* v. *Rochester*, 5 Cowen, 462; *Caldwell* v. *City of Alton*, 33 Ill. 416; *City of Boston* v. *Shaw*, 1 Metc. 130; Sedg. C. L. 466; *Shelton* v. *Mayor of Mobile*, 30 Alabama, 540.

Messrs. UNDERWOOD & DAVIS, for the appellee.

1. The first proposition in appellant's brief is too general, and no case is cited analogous to the issue pending.

2. Although previously the appellant had a lawful right to travel through the city of East St. Louis, it was competent for the legislature of the State to impose terms and conditions, such as a license, for the purpose of improving and keeping in repair the streets of said city, upon him, and all other persons who travel through the same, just as they impose tolls upon all farmers who travel over corporation turnpikes.

3. The objection, that the charter, ordinance and license, are "*in restraint of trade*," has no application to this case, notwithstanding the general principle established by the authorities cited, — *as the effect of all licenses is to restrain trade, without a license;* a farmer going to market is taxed at the toll gates, etc., etc.

4. The charter and ordinances are both constitutional; and, for the purpose of keeping the streets in repair, are very properly adopted.

5. The appellant has a complete remedy at law, if the ordinance *is not authorized* by the charter, or if the charter is unconstitutional. *West* v. *Mayor*, 10 Paige, 539; *Burnet* v. *Craig*, 30 Ala. 135.

6. An injunction will not be granted to restrain a municipal corporation from enforcing an invalid ordinance. *Burnet* v. *Craig*, 30 Ala. 135; *West* v. *Mayor, etc.*, 10 Paige, 539.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This record presents the question, whether the city of East St. Louis exceeded its authority in adopting and endeavoring to enforce an ordinance preventing persons from hauling stone coal through the streets, in wagons or other vehicles, without first procuring a license for that purpose. It appears from the record that appellant is largely engaged in the business of mining, transportation and sale of coal; that he, when the bill was filed, employed about sixteen four-horse teams, in hauling coal through the town of East St. Louis. And, from the extent and character of his business, these teams must have passed and repassed almost constantly. This, then, renders the repair of the streets more expensive and more necessary from the fact, that his vehicles seem to be large and heavy. For the comfort and convenience of the citizens of the place, as well as persons not residing therein but traveling on its streets, it is necessary that they should be repaired and kept in good condition.

It is urged, that a bill for an injunction may be maintained to restrain a corporation from abusing its franchises, when their acts will occasion a permanent injury. Even conceding this to be true, it must appear that the acts complained of are unauthorized and injurious, and of such a character that full and adequate relief cannot be had at law.

Was this ordinance requiring the payment of this license authorized by the charter of the city? The 56th section (Private Laws, 1865, p. 350) declares, that the common council shall have power to direct, license and control all wagons and other vehicles conveying loads within the city, and prescribe the width and tire of the same. The ordinance under which the right to proceed against appellant is claimed, declares, that no

person shall, without complying with the ordinance, hire out or keep for hire, or use or cause to be used, for him, in the transportation of persons or property from one part of the city to another, or from places within to places without the city, or from beyond the city to the city, any hackney carriage, omnibus, dray, cart, wagon or other vehicle. It requires the owner of any such vehicle to take out a license, according to a schedule of rates named in the ordinance.

Subsequently, this ordinance was amended, by which persons transporting coal in such vehicles, from places in to places out of the city, or from within to without the city, whether hired, kept for hire, or used by the owner, were required to obtain the license provided for by the ordinance. Thus, it will be seen that the charter authorizes the ordinance, and the latter requires that a license shall be obtained before such wagons and teams can be employed in transporting coal in or through the city.

But it is insisted, that the ordinance is unreasonable, and in restraint of trade, and is therefore invalid. We do not perceive the force of this objection. That it, like all other licenses, restrains trade without a compliance with the law, is, in a limited sense, true. The law prohibiting the sale of intoxicating drinks is of the same character, but it will not be seriously contended, that it is in restraint of trade to the extent that prohibits the enforcement of the law. The same is true of pedlars, brokers, factors, ferrymen and hackmen, the right to require licenses of whom has never been questioned. In this case appellant, like the owner of a team passing over a toll bridge or ferry, must submit to a reasonable exaction. So, of a turnpike, or a plank-road. In this case as in those, the corporation is required to keep the streets in repair, and it is but reasonable and just that persons using them shall contribute to a reasonable extent to the expense of, and outlay for the purpose.

Is this ordinance reasonable? If so, then the city has the right to enforce it. When it is remembered, that appellant was using heavy wagons with four-horse teams, heavily loaded, and this constantly, we must regard the tax imposed for the

license not only reasonable but even low. If the corporation were to attempt to impose such fees for a license as to become unreasonable and oppressive, then the corporate body would transcend their power, and such acts would be unauthorized and invalid. But such is not the fact in this case, and the decree of the court below must be affirmed.

Decree affirmed.

SARAH ANN FARRELL
v.
NICHOLAS PATTERSON.

1. APPEALS — *allowed to the plaintiff to one of several executions on a joint trial of the right of property.* A sheriff, having two executions, one in favor of E. & Co., the other in favor of P., against F., levied them both on the same goods, as the property of F. The property was claimed by the wife of F., as against both executions. A trial of the right of property was had before a sheriff's jury, both causes being tried together; a verdict was rendered in favor of the claimant. Both execution creditors appealed to the Circuit Court. E. & Co. failed to file appeal bond. P. filed his bond. The case was docketed by the clerk as *Sarah A. F.* v. *E. & Co.* On motion, the appeal as to E. & Co. was dismissed. P. was allowed to docket his appeal and prosecute it separately. To this the claimant objected. *Held*, that, although the trial before the sheriff's jury was carried on as one suit, P. was an independent party to that suit, and his rights were in no degree mixed up with those of E. & Co.; and he could take an appeal to the Circuit Court without regard to the action of E. & Co. in the matter.

2. SAME. Where a sheriff levies upon the same property by virtue of two executions in favor of two distinct parties, against the same defendant, and the property is claimed by a third party, as against both executions, and a joint trial of the right of property is had before a sheriff's jury, and a verdict rendered in favor of the claimant, the plaintiff to either execution has a separate and independent right to an appeal to the Circuit Court, without reference to the action of the other.

3. WILL — *when admitted in evidence.* If a will is not properly authenticated, it is not admissible for any purpose as evidence in a case.

4. MARRIED WOMEN — *their rights under the act of* 1861. There are three classes of property mentioned in the act of 1861, in relation to the rights of married women, to be affected by its provisions, viz.: First, the property belonging to any married woman as her sole and separate property at the

Statement of the case.

time when the law was passed or took effect; second, the property of women thereafter to be married; and, third, the property thereafter to be acquired by married women. This act was designed to clothe married women, for the future, that is, from and after the time it took effect, with the exclusive title to and dominion over their own property; and as one incident thereto, to protect it from execution or attachment for the debts of her husband.

5. Where a woman was married, and received large sums of money, prior to the passage of the act of 1861, the money, by force of well known and long established principles of law governing marital relations, became the property of her husband; and any chattels purchased with it became his likewise.

6. The statute of 1861, never was designed to take from the husband that which belonged to him as a consequence of the marriage. The act is prospective only, and was not designed to change, and could not change, the title to property possessed by the wife prior to its passage, and which by her marriage vested in her husband.

7. SAME—*burden of proof where wife claims property.* The presumption of law is that the husband is the owner of all the property of which the wife may be in possession, especially if they are living together as husband and wife. To overcome this presumption, she must show affirmatively, the property is her own, and derived from a source other than her husband, and in good faith.

8. SAME—*the earnings of married women.* The earnings of a married woman are not vested in her by the act of 1861. They belong to her husband, as well as the property purchased by them.

APPEAL from the Circuit Court of Perry county; the Hon. W. H. GREEN, Judge, presiding.

This was a case of the trial of the right of property before the sheriff of Perry county. The property was levied upon by the sheriff, by virtue of two executions against Joseph Farrell, the husband of the claimant—one execution was in favor of W. F. Enders & Co., the other in favor of Nicholas Patterson. The executions were both levied upon the same property.

The claimant gave notice under the statute to try the right of property as against both executions. The question, as against both executions, was tried in one proceeding.

The sheriff's jury found a verdict in favor of the claimant.

The plaintiffs to both executions appealed to the Circuit Court. Patterson filed his appeal bond as required by law. W. F. Enders & Co. neglected to file a bond.

When the papers were received by the circuit clerk, he docketed the case "Sarah Ann Farrell v. W. Enders & Co."

The court, on motion, dismissed the appeal of Enders & Co. Thereupon Patterson asked and obtained leave to docket his appeal, and obtained a rule on the sheriff to file a transcript of the proceedings before him, in Patterson's case.

On the trial in the Circuit Court, the claimant introduced evidence that she was married to Joseph Farrell in the year 1849; her maiden name being Sarah Ann Sappington; after her marriage her father gave her some means; he also gave her $500 by his will; she had two negroes, a man and a girl, which were sold by her husband for her, he getting therefor $1,300. The negroes were sold in the year 1858 or 1859. She also had some household furniture which she received from her father.

Evidence was introduced, that they came to Illinois from the State of Missouri in the year 1859, and have ever since been keeping a hotel at Tamaroa, the entire business being carried on in her name. The will of Mrs. Farrell's father was offered in evidence, and rejected because it did not appear to be properly authenticated.

Witnesses testified, that the property levied on was purchased by claimant in her own name from parties other than her husband.

The jury in the Circuit Court rendered a verdict adverse to the claimant. A motion for a new trial was overruled, and exceptions taken. The claimant then moved for an arrest of judgment, which was also overruled, and judgment entered upon the verdict. The case is brought to this court by appeal.

Messrs. EDWARD V. PIERCE & JOHN DOUGHERTY, for the appellant.

Mr. GEORGE W. WALL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record presents a case of the trial of the right of property in certain goods and chattels levied on by the sheriff of

Perry county, by virtue of two executions in his hands issued out of the Circuit Court of that county, the one in favor of William F. Enders & Co., and the other in favor of Nicholas Patterson, and both against Joseph Farrell. The claimant of the property, as against both executions, was Sarah Ann Farrell, the wife of Joseph Farrell, the execution debtor. The sheriff's jury found the property to be in the claimant, Sarah Ann Farrell. An appeal was prayed for by both the execution creditors to the Circuit Court. Patterson filed the appeal bond required by the statute. Enders & Co. failed to file a bond. The papers coming into the Circuit Court by this appeal, the clerk docketed the cause "Sarah Ann Farrell, against W. F. Enders & Co." On motion of the claimant, the appellant here, the court dismissed the appeal of Enders & Co., and thereupon, Patterson asked and obtained leave to docket his appeal, which being done, a rule was obtained against the sheriff requiring him to file the transcript of the proceedings before him on the trial of the right of property as against Patterson's execution.

To this appellant objected, insisting, that, inasmuch as Enders & Co. had failed to file an appeal bond, Patterson's appeal should be dismissed, as he was a party to the trial of the right of property and but one appeal could be taken, and as one was taken by Enders & Co. and not completed by filing a bond, Patterson's appeal must also be dismissed. To be more particular, the reasons assigned for dismissing the appeal were: first, because the sheriff had two executions against Joseph Farrell, one in favor of Enders & Co. and the other in favor of Patterson, and he levied both executions on the same property which was claimed by Sarah Ann Farrell, and the trial of the right of property before him was for the property claimed by the said Sarah Ann Farrell which was levied on by virtue of both the executions, and was tried together; second, because Enders & Co. did not join in the appeal; third, because all the parties interested, and who appeared before the sheriff upon the trial of the right of property, did not join in the appeal; fourth, because this is another and different cause from that tried by

the sheriff's jury; fifth, because it is too late now, for the first time, to separate the trial on said executions, and make out of said trial before the sheriff, two cases, one, *Sarah Ann Farrell* v. *W. F. Enders & Co.*, and the other, *Sarah Ann Farrell* v. *Nicholas Patterson.*

These reasons failed to influence the Circuit Court, and we think properly, and the motion to dismiss Patterson's appeal was denied.

Patterson was not in the same boat with Enders & Co., nor did his fate depend on that of the latter. If, for convenience, the trial before the sheriff's jury was carried on, as one suit, still Patterson was an independent party to that suit, and his rights in no degree mixed up with those of Enders & Co. His case was his own, which he could take by appeal to the Circuit Court without any regard to the action of Enders & Co. in the matter. Under the circumstances of this case, each execution creditor, should there be a score of them, would have an independent right of appeal. Neither one could be prejudiced by the act of another.

An exception was also taken to the rejection of the will of L. Sappington, as an instrument of evidence. It is admitted by appellant's counsel, that the will was not properly authenticated, consequently it was not admissible for any purpose as evidence in the cause.

Upon the point that the court refused to admit evidence of the dismissal of the appeal we have only to say, we are at a loss to perceive wherein such evidence was pertinent. The fact that Enders' appeal had been dismissed had nothing to do with Patterson's case, and therefore the court properly ruled it out.

Disposing of these preliminary questions, the one remaining arises out of the construction to be given to the act of 1861, to protect married women in their separate property, in force, April 24, 1861.

We have before considered this act, and put a construction upon it, so far as the right of a married woman to sue in her own name for her separate property was involved, in *Emerson*

v. *Clayton*, 32 Ill. 493, and so far as her earnings were involved, in the case of *Bear* v. *Hays*, 36 id. 280.

It is insisted by appellant's counsel that there are four distinct classes of property mentioned in that act to be affected by its provisions, — first, all the property, both real and personal, belonging to any married woman, as her sole and separate property, at the time of the passage of the act; second, all the property which any woman who may marry after the passage of the act owns at the time of her marriage; third, all the property which any married woman during her coverture acquires in good faith from any person other than her husband, by descent, devise or otherwise, together, fourth, with all the rents, issues, increase and profits of the three before mentioned kinds of property, and that the same remains, notwithstanding her marriage, during her coverture, her sole and separate property, under her sole control, and to be held, owned, possessed and enjoyed by her as though she was sole and unmarried, and not subject to the disposal, control or interference of her husband, and is exempt from execution or attachment for the debts of her husband.

This classification does not differ much from that made by this court in the case of *Rose et al.* v. *Sanderson*, 38 Ill. 247. In that case it was the opinion of this court that but three classes of cases were provided for by that act, viz.: First, for property belonging to any married woman as her sole and separate property at the time when the law was passed or took effect; second, for the property of women thereafter to be married; and third, for property thereafter to be acquired by married women. We said in that case that this act designed to clothe married women for the future, that is from and after the time it took effect, with the exclusive title to and dominion over their own property, and, as an incident thereto, to protect it from execution or attachment for the debts of the husband.

We are at a loss to perceive under which of these three classes the claim of the appellant, so urgently pressed by her counsel, can be arranged, since, by the proofs in the cause, she was married in 1848 or 1849, many years prior to the passage

of the act of 1861, and the large sums of money testified to by her relatives, the Sappingtons, came to her years before the enactment of the law in question. These moneys, then, by force of well known and long established principles of law governing marital relations, became the property of the husband, and the chattels purchased with it became his likewise The statute of 1861 never was designed to take from the husband that which belonged to him as a consequence of the marriage, nor could it do so without violating those principles of right and justice no legislature has ever, knowingly and of purpose, disregarded and ignored. All the well recognized presumptions arising from the marital relation with respect to the title to property of the wife still remain, notwithstanding this statute. The act is prospective only, and was not designed to change, and could not change, the title to property possessed by the wife prior to its passage, and which, by her marriage, vested in her husband. All the instructions of the court, therefore, on this branch of the case, were substantially correct. The first instruction given for appellee is said, by counsel for appellant, to impose a burden upon *femes covert* unknown to the law. That instruction is as follows:

"The court instructs the jury, that, although they may believe, from the evidence, that the property in question was purchased in the name of Sarah Ann Farrell, yet, if she has failed to prove and show affirmatively that the money or consideration paid for said property belonged to her in her own right, and that she acquired the same through some other source than through her husband, she cannot recover, and you must find against her."

Counsel insist, if this be the rule, a *feme covert* would be under the necessity of placing some mark upon all her money at the time she obtained it, by the person of whom she got it, and then keep such person near her, so that, if the property purchased by her should be levied upon by her husband's creditors, or taken from her by any person wrongfully, she could prove the identical property was purchased by her with the

identical pieces of money so marked and known, for otherwise she could not recover or protect her property, however just her claim. No such hardship is perceived as likely to result from the principle announced in the instruction. It is but the repetition of an old and quite familiar principle, that he who asserts an affirmative right must establish it by proof; the *onus* is upon him. So with a married woman, if she asserts that she bought property and paid for it with her own money received in good faith through a source other than her husband, she must prove it, not by proving she paid out the identical money she had thus received, but that she had received money equal to the price of the property which she paid, and from whom she received it, or that the property was a gift to her by a donor not her husband, nor the gift procured by the expenditure of his money. Counsel insist, that good faith is always presumed in the purchase and conveyance of property until it is shown to be otherwise, but that this instruction puts a badge of fraud upon any act of purchase of property by a *feme covert*, without any proof of bad faith or fraud, and therefore cannot be the law.

We do not so regard the instruction. As we have said, it is but the recognition of the familiar principle, that he who affirms a fact must furnish proof of the fact. Nor do we understand, that the act of 1861 was designed to overthrow the presumption of the common law, that the husband is the owner of all the property of which the wife may be in possession, especially if they are living together as husband and wife. To overcome this presumption, she must show affirmatively, the property is her own, and derived from a source other than her husband, and in good faith. The substance of the instructions embody those principles, and are the law.

But, it is insisted, that the earnings of appellant, as an hotel-keeper since the act of 1861, belong to her.

The act does not vest the earnings of the wife in her, as this court decided in the case of *Bear* v. *Hays*, *supra*. They belong to her husband, and the property purchased by them is his also.

Upon the merits of the case, as developed by the testimony, we think the verdict was right. The jury had the sagacity to perceive, that though ostensibly the appellant was the purchaser of the property levied on, yet really, the money which paid for it came from the husband, and the forms of sale and payment to which resort was had, were mere contrivances, easily penetrated, by which to veil the transactions.

Believing the instructions to be correct, and that the evidence supports the verdict, we must affirm the judgment.

Judgment affirmed.

EBENEZER CAPPS
v.
ISAAC WATTS.

GUARANTY. In error, brought upon the following instrument:

"VANDALIA, ILL., April 16, 1864.

"In consideration of sixty-five dollars, to be paid to J. & J. W. Bunn, Springfield, Illinois, I, Charles Capps, hereby agree to make a warranty deed to Isaac Watts to the following described real estate, viz.: Lot two, block nine, Gill's west addition, Atlanta, Logan Co., Illinois. The above premises having been in law, and if not decided at this date, the above to be a firm contract—said Isaac Watts agreeing to pay all taxes against said real estate, provided the same has not been sold for taxes, and is beyond redemption. If the property has been sold and the time of redemption expired, then the above to be null and void, otherwise to remain in full force and effect—said Capps giving possession on the 7th day of May, 1864—said Watts being the plaintiff in the suit against said real estate, hereby agrees to dismiss said suit at his, said Watts', costs. (Signed) CHARLES CAPPS,
"E. CAPPS,
"ISAAC WATTS.

"I, E. Capps, guarantee that Charles Capps complies with the above agreement. (Signed) E. CAPPS."

it is *held*, that the signature of Ebenezer Capps to the first contract was placed there as security for Charles Capps. That the guaranty written below and signed by him was to specify and explain the object of his signature to the first agreement.

Statement of the case.

WRIT OF ERROR to the Circuit Court of Fayette county; the Hon. CHARLES EMERSON, Judge, presiding.

This was an action of assumpsit, brought by Isaac Watts against Ebenezer Capps, in the Circuit Court of Fayette county.

The declaration alleges that the plaintiff and one Charles Capps entered into a written agreement (the same as set out in the opinion of the court), and avers that the defendant, in consideration that the plaintiff would enter into said contract, signed the same as guarantor for the performance of said contract by Charles Capps; that none of the causes existed which were to prevent said contract from becoming a firm contract; that the plaintiff had dismissed the suit referred to; that he had paid taxes on the lot, and redeemed the same from tax sales; and paid costs to the amount of sixty-five dollars; that Charles Capps had refused to convey the lot; and that the same was worth $500; that Charles Capps was insolvent; and by means of the premises the defendant became liable, etc.

Plea — general issue and notice. Trial by the court — jury being waived.

On the trial, the agreement set out in the opinion was offered in evidence by the plaintiff, and objected to by the defendant, objection overruled, and contract read.

Record of Logan Circuit Court showing, that a suit for foreclosure of mortgage in favor of *Isaac Watts* v. *Albert Goodell & Charles Capps*, was dismissed by the plaintiff at his own cost.

Certificate of redemption from sale for taxes by Isaac Watts of the lot described in contract.

Receipt from J. & J. W. Bunn to Isaac Watts for sixty-five dollars, to be applied in favor of Charles Capps.

—— Tripp, a witness, stated that the lot in question was worth, in 1864, the sum of four hundred and twenty-five dollars.

J. W. Ross stated, that, before commencement of suit, he, as the agent of plaintiff, had demanded from Charles Capps a deed for the property which was refused; that Charles Capps

had made several propositions to settle, some of which were accepted, and Capps failed to comply; said he was poor and not able to pay the money; did not think it was right he should do so; that said Capps had no property that he knew of; did not know whether he was insolvent or not.

Lewis L. Cluxton stated he was assessor in Vandalia, in 1863, 1864, 1865; that Charles Capps said he had nothing but his house furniture.

On the part of defendant below:

Charles W. Higginbottom stated he was present when the said contract was written and that he wrote the same; did not know that E. Capps had signed the same until he saw it at this trial; that he has no recollection of E. Capps signing it or being asked to sign it; that he supposes E. Capps signed it as security for Charles Capps; after the contract was executed it was handed to Mr. Watts, and all of them left the room, except himself and E. Capps; in about ten or twenty minutes, or perhaps half an hour, Watts came back and asked E. Capps if he would not guarantee the said contract, between Charles Capps and himself; E. Capps said he had no objection, and that he would; witness then wrote the guaranty at the bottom of the contract, and Capps signed it and gave it to Watts, and Watts then left; there was nothing received by Capps for guaranteeing said contract nor any thing promised to him; he was asked to sign it as stated, and he did so.

This was all the testimony; judgment for plaintiff for four hundred and twenty-five dollars, to which defendant excepted.

The case is brought to this court by writ of error.

Mr. A J. GALLAGHER, for the plaintiff in error.

Messrs. STEWART, EDWARDS & BROWN, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit, brought by Isaac Watts against Ebenezer Capps, upon the following instrument:

"VANDALIA, ILL., April 16, 1864.

"In consideration of sixty-five dollars, to be paid to J. & J. W. Bunn, Springfield, Illinois, I, Charles Capps, hereby agree to make a warranty deed to Isaac Watts to the following described real estate, viz.: Lot two, block nine, Gill's west addition, Atlanta, Logan Co., Illinois. The above premises having been in law, and if not decided at this date, the above to be a firm contract—said Isaac Watts agreeing to pay all taxes against said real estate, provided the same has not been sold for taxes and is beyond redemption. If the property has been sold and the time of redemption expired, then the above to be null and void, otherwise to remain in full force and effect—said Capps giving possession on the 7th day of May, 1864—said Watts being the plaintiff in the suit against said real estate hereby agrees to dismiss said suit at his, said Watts', costs. (Signed) CHARLES CAPPS,

"E. CAPPS,

"ISAAC WATTS.

"I, E. Capps, guarantee that Charles Capps complies with the above agreement. (Signed) E. CAPPS."

A jury was waived, and on the trial one Higginbottom was called as a witness, who stated that he wrote the instrument; that he had no recollection of Ebenezer Capps signing the body of the instrument; that, after the contract was executed, Watts and Charles Capps withdrew, leaving himself and Ebenezer Capps; that in ten or twenty minutes or half an hour Watts returned and asked Ebenezer Capps if he would not guaranty the contract for Charles Capps, that Capps said he would, and thereupon witness wrote the guaranty at the bottom of the contract and Ebenezer Capps signed it. The witness further stated that no consideration was paid for Capps' guaranty and that both of his signatures were genuine.

It is insisted by the counsel for plaintiff in error, that the guaranty was a contract subsequent to the original, and that it needed both a consideration and a revenue stamp to make it valid. The original contract, it should be remarked, was

stamped. But our construction of this transaction is simply this. By an examination of the agreement, it will be seen that Ebenezer Capps had no interest in it whatever. He was not required by it to do any thing. His first signature, then, under that of Charles Capps, is senseless, except upon the theory that he placed it there with a view of becoming security for Charles. We do not say that this would be a legal presumption from his unexplained signature, but the guaranty written below and signed by him removes all doubt. It probably occurred to Watts, after he retired from the room, that the signature of Ebenezer Capps, as it then stood, might admit of controversy as to its object, and he therefore returned and had him specify the object by re-signing under a guaranty written out in full. As it would be absurd to have him guarantee his own contract, it is evident the parties did not consider he had signed the instrument as a principal. We must suppose that both his signatures were intended for the same purpose, and to bind him in the same way, and that the only object of the second signing under the guaranty was to explain the purpose of the first. We regard the second signature as but a part of the transaction which had occurred a few minutes before, and as only completing what the parties had already sought to do, and therefore requiring neither a new consideration nor a new stamp. The other objection, that there was a variance between the instrument offered in proof and that described in the declaration, is without foundation in the view we have taken of the case.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

ABRAM MIDDLESWORTH.

1. NEGLIGENCE — *relative* — *liability.* In actions against railroad companies for injuries inflicted by negligence, it is held, that the company is not liable if the plaintiff has been guilty of negligence which has contributed to the injury, unless it appears that the company has been guilty of negligence

more gross than that of the plaintiff. That, in this class of actions, the jury may compare the degrees of negligence.

2. ALLEGATIONS AND PROOF. Where a declaration proceeds for one cause of action, the plaintiff cannot recover by proving another and different cause of action. To recover, he must prove the averments of some one of the counts of his declaration.

APPEAL from the Circuit Court of Shelby county; the Hon. CHARLES EMERSON, Judge, presiding.

This was an action of trespass *on the case* brought by Abram Middlesworth, in the Shelby Circuit Court, against the Illinois Central Railroad company. The declaration contains three counts. The first for negligence, in failing to fence their track, whereby the stock was killed. The second and third for killing the plaintiff's mules, by the negligent management of the engine and cars of the company in operating their road. The plea of the general issue was filed.

A trial was had by the court and a jury. It appears that plaintiff had a large herd of mules in a pen adjoining the roadway of defendant, the fence on the side of the road forming one side of the lot in which the mules were confined. That the mules broke into the road, and a passing train killed twenty-two of the herd, worth, as it was agreed, $2,840.

Plaintiff introduced evidence to prove negligence on the part of the employees of the road, and defendant, testimony to prove care and diligence. Among other instructions asked by defendant, the court refused to give his fifth and sixth, which are as follows:

"5. That, although the defendant may have been guilty of negligence in the management of the train in question, yet if the plaintiff was also guilty of a want of proper and reasonable care and prudence on the occasion by placing so many mules in an inclosure of the size as stated, he knowing the habits and disposition of the mules when frightened, then, unless the proof shows that the conduct of the engineer was negligent, and not merely careless and imprudent, the law is

for the defendant, and the plaintiff cannot recover for the damage done.

"6. That the plaintiff cannot recover upon the second and third counts in said declaration, unless it is proved to their satisfaction that the servants of defendant were negligent in the mangement of the train."

The jury found a verdict for the plaintiff, and assessed the damages at $2,840. Defendant entered a motion for a new trial, which was overruled, and judgment rendered on the verdict, and defendant, to reverse the judgment, prosecutes this apppeal.

Mr. A. J. GALLAGHER, for the appellant.

Messrs. MOULTON & CHAFEE, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

A reversal is asked, because the court below refused to give appellant's fifth instruction. It asserted a correct legal proposition, and should have been given. It informed the jury, that, although the railroad company might have been guilty of negligence in the management of their train, yet, if appellee was also guilty of a want of proper and reasonable care and prudence on the occasion of the injury, by placing so large a number of mules in an inclosure of the size stated, then, unless the evidence showed that the conduct of the engineer was negligent, and not merely imprudent, the appellee could not recover.

This court has repeatedly held, that, in this class of cases, where it appears that the plaintiff has been guilty of negligence contributing to the injury, he cannot recover, unless it appears that the defendant has been guilty of negligence more gross than that of the plaintiff,—that in this class of actions the jury may compare the degrees of negligence. This instruction substantially told the jury, that, if appellee had been guilty of unreasonable negligence, and the engine driver

had not been guilty of gross negligence, they should find for appellant. By this instruction the jury would have been required to determine whether appellee had been guilty of unreasonable negligence, and if so, then whether the employees had been guilty of gross negligence. If they had so found, then they would have been required to find for appellee; but, if they found appellee guilty of negligence, and the engineer of no greater or higher degree of negligence, they would have found for appellant.

The first count in appellee's declaration proceeds for a liability in failing to fence their railroad track, whereby the stock were killed. The second and third counts proceed for damage to the stock from the negligence of the company. Each count containing a separate cause and ground of recovery, to succeed under it, the plaintiff must sustain it by proof of the facts contained in its averments. A count setting up one cause of action cannot be sustained by proof of another and different cause of action. To have recovered under the second or third counts, in this declaration, it was, therefore, indispensably necesssary to prove negligence on the part of appellant, producing the injury complained of and for which a recovery was sought. The sixth instruction announced these rules, and should, there-therefore, have been given. The judgment is reversed and the cause remanded.

Judgment reversed.

AARON BLISS *et al.*

v.

JAMES KENNEDY *et al.*

1. CONVEYANCES — *what passes by a grant.* Where a factory and the land on which it stood with the appurtenances were conveyed, the factory being the subject-matter of the grant, all that belonged to the tract conveyed, and over which the grantor had dominion, passed by his deed, under the term "appurtenances," and nothing more.

Syllabus.

2. SAME—*grants how construed.* Courts always construe grants, by considering the condition of things at the time the grant was made.

3. Where a grantor conveyed a factory, and the land on which it stood, with its appurtenances, he owning nothing outside of the boundaries of the land conveyed, above or below the factory, he could convey nothing beyond the premises themselves; and therefore no part of a stream above the factory, by which the factory was supplied with water, could pass as appurtenances to it.

4. SAME—*effect of conveyance upon the future rights of the grantor.* Where a deed conveys a factory, located on a stream which supplies it with water, with the land on which it stands, "together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining," the grantor is not thereby inhibited from acquiring future rights in the stream.

5. RIPARIAN PROPRIETORS—*priority of use gives no exclusive right.* Priority of use of the water of a stream by a riparian proprietor gives no exclusive right.

6. SAME—*their respective rights.* The rule is, where two factories are located on the same stream, so far as the water is destroyed by being converted into steam, neither is entitled to its exclusive use; it is to be divided between them as nearly as may be according to their respective requirements; if each factory requires the same quantity of water it should be equally divided; but, while the water is incapable of being thus divided with mathematical exactness, if the jury should find that the upper factory has used more than its reasonable share, or has diverted the water from its natural channel after using it, or so corrupted it as to deprive the lower proprietor of its use to such a degree as to cause a material injury to that factory, it would be ground for damages, and ultimately for an injunction.

7. CHANCERY—*rights of riparian owners must be established in a court at law.* To authorize the interposition of a court of chancery by injunction to restrain a riparian proprietor from using the water of a stream for manufacturing purposes, the complainant must first establish his rights, and a violation of those rights, in a court at law.

8. SAME. If a riparian proprietor willfully, or wantonly, or carelessly, so use his privilege as to injure the rights of others, the courts of law are open to them, in which to establish their rights and redress the wrong. Chancery cannot interpose until the right and its invasion are determined.

9. SAME—*when chancery will prevent an injury.* Chancery may, for the purpose of preserving property until a legal decision upon the right set up can be had, restrain by injunction a party doing or threatening an invasion of the rights claimed, but in all such cases the party complaining must show a strong *prima facie* case in support of the title which he asserts, and show that he has not been guilty of any improper delay in applying for the interposition of the court. In such case the court will also take into consideration the degree of inconvenience and expense to which the granting of the injunction would subject the defendant in the event of his being found to be in the right.

Statement of the case.

WRIT OF ERROR to the Circuit Court of Coles county; the Hon. O. L. DAVIS, Judge, presiding.

This was a suit in chancery, commenced in the Coles county Circuit Court, by Aaron Bliss and Thomas Lytle against the defendants in error.

The complainants by their bill allege in substance, that they are the owners in fee of a lot of ground in Charleston, conveyed by deeds with the usual covenants, by James Kennedy, one of the defendants, to complainants, on which lot James Kennedy had previously, to wit, in 1855, erected a woollen factory, with capacity to do a large business in that line, and that the defendants, five or six years afterward, erected their factory on the same stream, on their own lot, and about one hundred yards above complainants' factory. Complainants charge that defendants have used the water of the stream to their detriment, and have occasionally let their dye-slops escape and get into the stream, and thence into the pool of complainants; and further, that defendants were about to proceed to dig a deep drain from their factory through the land of complainants, against their will, for the purpose of carrying off their slops.

The bill prays for an injunction restraining the defendants from interfering with the alleged rights of the complainants.

The defendants' answer admits the erection and ownership of the two factories, and the doing of the amount of custom and other work claimed in the bill, but denies the claim of complainants of any superior or exclusive right to the use of the water flowing in the ravine or stream on which said factories are situated, either by virtue of the deeds from James Kennedy, or priority of occupancy; defendants deny all intention to injure complainants by waste of dye-stuffs, or otherwise; and deny any intention or desire to dig a ditch through the lot of complainants, aforesaid, without their consent.

To which the complainants filed a general replication.

The case was heard at the March Term, 1866, of the Circuit Court of Coles county. Upon the hearing the injunction prayed for was refused, and the bill dismissed.

The material facts appear in the opinion.

The errors relied upon are, the refusing of the injunction, and dismissing the bill, by the court below.

Messrs. COLER & SMITH, and WILEY & PARKER, for the plaintiffs in error.

Messrs. JOHN SCHOLFIELD and O. B. FICKLIN, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The claim made by the complainants, plaintiffs in error here, is reduced to this simple question, have the complainants, by reason of priority in the use of this water, or from any other cause, the exclusive right to the use of the water, which these springs and rivulets supply?

The plaintiffs in error insist, as against these defendants, they have such right, derived in two ways; first, by the deeds of Kennedy to them, and second, on the evidence in the record. Upon the first point, it is only necessary to recur to those deeds, with a short preliminary statement of some facts.

James Kennedy, one of the defendants in error, had, in 1855, erected a woollen factory on a certain piece of ground in the town of Charleston, in Coles county, and operated it until 1857, when Thomas Lytle, one of the plaintiffs in error, purchased of him an undivided half interest in the factory, and business and lot of ground, together with the water privilege thereto belonging, and all appurtenances whatsoever. Kennedy and Lytle carried on the factory until 1859, when they sold an undivided third of the ground, factory and business, to Joseph Peyton, and the same was carried on by Kennedy, Lytle & Peyton until March, 1860, at which time Aaron Bliss, the other plaintiff in error, bought the interests of both Kennedy and Peyton, taking a general warranty deed from them for an undivided two-thirds of the same. The premises are described in this deed as "one undivided two-thirds of the building and machinery, together with two-thirds of the following parcel or

lot of ground (describing it by courses and distances) together with all the hereditaments and appurtenances thereto belonging, or in any wise appertaining."

Now the claim of plaintiffs in error is, that by this deed Kennedy virtually covenanted, that his grantees should have the use of the water as it then came to the factory, the flow of the water from the springs and branch on which the factory was erected being appurtenant to the land granted.

At the time of the execution of this deed by Kennedy, and at the time he executed the deed to Lytle, it is not pretended Kennedy had any right, title or claim to any land save that on which the factory was erected. By his deed then, he cannot be held to have sold and conveyed any thing but the land and factory specified in it, and the appurtenances to that land and factory then belonging.

Because a small stream, fed by springs, flowed from a distant source, through this land, it cannot, with any plausibility, be contended that the water or stream outside of the boundary of the land he then owned and conveyed, included those other portions of the stream flowing through other lands he did not own, as appurtenant to the land he conveyed, and yet such is the claim of the plaintiffs in error, a claim having no foundation in reason, law or justice. All that belonged to the tract conveyed, and over which Kennedy then had dominion, passed by his deed under the term "appurtenances," and nothing more. The principal thing conveyed was the factory and the ground on which it stood, and all that pertained to either, which Kennedy owned, passed by his deed.

This proposition is so reasonable, that the mere statement of it should be sufficient, but there is authority on the point. It was held in *Rockly* v. *Sprague*, 17 Maine, 281, that the grant of a mill carried with it the use of the head of water necessary to its enjoyment, with all incidents and appurtenances, but only so far as the right to convey to this extent existed in the grantors. And the same doctrine is recognized by this court, in *Wilcoxon* v. *McGhee*, 12 Ill. 381, in which it was held, where a mill and its appurtenances were conveyed,

the mill being the subject matter of the grant, the right to continue to overflow the lands of the grantor continued to the same extent as when the grant was made. And the same was held in *Hadden* v. *Shoutz*, 15 id. 581. Courts always construe grants by considering the condition of things at the time the grant was made. Kennedy, when he conveyed the factory and land, with its appurtenances, to complainants, owning nothing outside of the boundaries of the land conveyed, above or below the factory, could convey nothing, and, therefore, no part of the stream above the factory could pass as appurtenant to it. Nor are there any covenants in Kennedy's deeds inhibiting him from the future acquisition of rights in this stream of water, and if there were, they could not affect his co-defendants, — they would not be bound by them.

The claim of complainants based upon Kennedy's deeds falls to the ground.

Is there, then, any reasonable ground of complaint on the part of complainants shown by the evidence as growing out of the subsequent acquisition by these defendants of the land and stream above this factory, and thereon erecting a rival factory?

Complainants charge in their bill of complaint, that the erection of this factory by these defendants was with a view to break up complainants' business, and to supersede them in the woollen factory business, and to divert the business and custom of complainants to them, the defendants. This factory was erected by the defendants, in 1863, under the immediate view of complainants, and with their full knowledge of the steps being taken by the defendants to put it into operation, but not a word of remonstrance came from complainants, or of objection, until the rival factory was in successful operation, when it was discovered there was not water enough for both mills, and the Circuit Court was applied to for an injunction to restrain the defendants in the use of their property. This brings us to the consideration of the second ground of claim assumed by the plaintiffs in error, and that is, their exclusive right to the use of this water, established by the facts in the case.

Those facts go to show, that plaintiffs in error have priority of use; that, in the natural flow of this water, in wet seasons, or after rains, there is water enough to run five or six such factories all the time, and it is admitted, on this record, that these factories run every day.

Now, it has been always held, that priority of use gives no exclusive right, and it is very difficult to provide any rule that shall exactly define the boundaries of rights claimed by upper and lower proprietors on the same water course. Adjudged cases, the most of them, relate to the use of water for a particular purpose, which, when that purpose is accomplished, is returned to its natural channel. Here the water is actually consumed by converting it into vapor, so that it cannot return to its usual channel to flow on.

What should be the rule in such cases cannot be precisely laid down, as this court said in *Evans* v. *Meriwether*, 3 Scam. 492. The case was this:

Smith & Baker, in 1834, bought six acres of land, through which a branch ran, and erected a steam mill upon it. They depended upon this branch and a well for water for their engine. A year or two afterward, Evans bought six acres of land on the same branch, above and immediately adjoining Smith and Baker's lot, and he erected on it a steam mill, depending, also, upon this branch and a well for water to run his engine. After the erection of Evans' mill, in 1836 or 1837, Smith & Baker sold to Meriwether. Ordinarily there was a supply of water for both mills, but in the fall of 1837 there was a drought, and the branch so far failed, that it did not afford water sufficient to run the upper mill continually. One of the hands employed about this mill made a dam across the branch just below the mill, and thereby diverted all the water into Evans' well. After this diversion of the water, the branch went dry below, and Meriwether's mill could not run more than one day in a week, and, to do that, it was supplied with water from his well. For this injury, Meriwether brought his action at law, and recovered judgment.

On appeal to this court it was held, after discussing the

respective rights of riparian proprietors thus situated, that, so far as natural wants are concerned, each proprietor in his turn may, if necessary, consume all the water to supply them, but, where the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream to carry on his manufacturing purposes, neither has a right, without a contract or grant, to use all the water; all have a right to participate in its benefits. When this is so, no rule, from the very nature of the case, can be laid down as to how much each may use without infringing on the rights of others. In such cases the question must be left to the judgment of the jury whether the party complained of has used, under all circumstances, more than his just proportion. This case, in some of the important facts, does not differ from the one before us, and it has been cited with approbation by Professor Washburne in his treatise on easements and servitudes. Washburne on the American Law of Easements and Servitudes, 222, 224.

The complainants having established no exclusive right to the use of this water, as against the defendants, by virtue of any covenants on the part of all or either of them; having, as the evidence proves, prior occupancy or use of the stream; and there being an insufficient supply of water for both factories in dry seasons, and prior occupancy giving no exclusive right, it is then a question for a jury, and not for a court, to determine, under all the circumstances, how the water has been appropriated.

This case then is not yet matured for the chancellor. Under the circumstances developed by this record the appellants have no right to resort to a court of equity until they shall have established their right at law.

To authorize the interposition of chancery by injunction,—a writ which may, in its operation, produce incalculable damage to a manufacturer, against the prosecution of whose legitimate business it is required to issue and does issue,—justice requires there should be first established not only a clear and palpable violation of the alleged rights of the party complaining, but the rights themselves should be certain, undoubted,

and such as have been ascertained by the verdict of a jury, and can be, thereby, clearly ascertained and measured.

When the right is thus established, the aid of a court of chancery to protect appellants in the full enjoyment of it will not be invoked in vain.

An examination of authorities on this subject will show, that, in cases like this, the right of the party must first be established at law, before the restraining arm of chancery can be called into exercise. 1 Daniels' Ch. Pr. (Perkins' ed.) 573, referring to *Weller* v. *Smeason*, 1 Cox, 102. Chancery may undoubtedly, for the purpose of preserving property until a legal decision on the rights set up can be had, restrain, by injunction, a party doing or threatening an invasion of the right claimed, but in all such cases the party complaining must show a strong *prima facie* case in support of the title which he asserts, and to show that he has not been guilty of any improper delay in applying for the interposition of the court. And the court has also to consider the degree of inconvenience and expense to which granting the injunction would subject the defendant in the event of his being found to be in the right. 3 Daniels' Ch. Pr. (Perkins' ed.) 1743.

We do not think such a case has been made out by complainants, nor is such the scope and object of their bill. They do not allege in it, that they have commenced, or are about to commence, legal proceedings to establish their right, but call upon a court of chancery to establish it in the first instance. The duty of that court is to protect a party in his acknowledged rights, rather than to establish new and doubtful ones. It is admitted by the defendants in error, that each of these proprietors has a right to the equal use of this water in the order of their location on the rivulet.

If, then, the upper proprietors shall willfully, or wantonly, or carelessly, so use their privilege as to injure the complainants, the courts of law are open to them in which to establish their rights and redress the wrong. *Evans* v. *Meriwether*, *supra*. Chancery cannot interpose until the right and its invasion are determined.

It is urged by plaintiffs in error, that this is an objection to the jurisdiction, which, not having been made in the Circuit Court, cannot now be made here.

We do not so regard it.

The court, on the hearing, caused this decree to be entered: And now on this day come the said parties, by their solicitors; and this cause is set down for hearing on the bill of complaint, answer, replication, and the parol and other evidence introduced, and after hearing the evidence and argument of counsel, and the court being sufficiently advised in the premises, it is considered by the court that the said complainants have no equity against the said defendants; it is therefore ordered by the court, that the complainants' bill do stand as dismissed out of this court, with costs to be taxed, etc.

The point made here does not go to the jurisdiction of the court. It is made directly upon the equity set out in the bill, and the argument, when concisely stated, is, that, with all the showing of the complainants, they have no ground on which to base a claim to restrain the defendants in the use of this water. Their rights must first be established before a jury. It was not a question for chancery to decide, whether defendants used more than their fair and reasonable proportion of this water. *Dunning* v. *City of Aurora*, decided April Term, 1866.

A reasonable rule, and one which we desire to lay down, would seem to be this: That so far as the water is destroyed by being converted into steam, neither of these factories is entitled to its exclusive use; that it is to be divided between them as nearly as may be according to their respective requirements; that, if each factory requires the same quantity of water, it should be equally divided; but, while the water is incapable of being thus divided with mathematical exactness, if the jury should find that the upper factory has used more than its reasonable share, or has diverted the water after using it from its natural channel, or so corrupted it, as to deprive the lower proprietors of its use to such a degree as to cause a material injury to that factory, it would be ground for damages, and ultimately for an injunction. The maxim "*sic utere tuo, ut*

alienam non loedas" applies to the defendants. Whatever is true of their rights, is true of the proprietors below them on the stream, the plaintiffs in error here.

As the Circuit Court dismissed the bill for want of equity, we must affirm the decree and require the plaintiffs in error first to establish their right and the extent of it, at law, and also the invasion of it by the defendants in error.

The bill will be dismissed however, without prejudice to the complainants.

Decree affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
JOSEPH WREN.

1. EVIDENCE—*published laws.* The laws certified by the secretary of State, and published by the authority of the State, must be received as having passed the legislature in the manner required by the Constitution, unless the contrary appears.

2. SAME—*legislative journals.* If parties seek to raise the question as to whether the yeas and nays were duly called upon the passage of an act, it is not sufficient to refer the court to the journal, with the expectation that the court will take judicial notice of all the facts that it discloses.

3. SAME—*of what the court will take judicial notice.* Although the court will take judicial notice of all acts of the legislature signed by the governor, and found in the office of the secretary of State, and although for some purposes the court may take judicial notice of the legislative journals, yet it is not the province of the court, at the suggestion or request of counsel, to undertake to explore the journal for the purpose of ascertaining the manner in which a law duly certified went through the legislature, and into the hands of the governor.

4. SAME—*how published law may be impeached.* If parties desire to show that a law has been passed without calling the yeas and nays, they must make the requisite proof of that fact, by means of the legislative journals, and introduce that proof into the record.

A duly authenticated copy of so much of the original journals as shows the facts relied upon by counsel for impeaching a law *prima facie* valid must be brought before the court through the record.

5. NEGLIGENCE. Gross or willful negligence on the part of a railroad company will make it liable for injury to an animal, even though the animal be improperly on the track.

6. If an animal is suddenly driven on the track by a dog, and there is no fault on the part of the engineer, the company will not be held responsible.

APPEAL from the Circuit Court of De Witt county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action brought by Wren against the Illinois Central Railroad Company, before a justice of the peace, to recover the value of a cow killed by a passing train in the town of Clinton. The plaintiff recovered a judgment before the justice for fifty dollars, from which the defendant took an appeal to the Circuit Court. In that court a jury was waived and cause tried by the court, and judgment rendered in favor of the plaintiff for forty-five dollars. From this judgment the defendant appealed.

The first point raised by the appellant is, that this is an action on the case, and the justice had no jurisdiction, the law of February 9, 1857, conferring jurisdiction on justices of the peace in such cases, not having been passed in a constitutional manner, and the suit should have been dismissed. In support of this position the appellant referred the court to the journals of the house and senate, to show that the act in question had not passed by ayes and noes, as required by the Constitution. Citing, as authorities, *Spangler* v. *Jacobi*, 14 Ill. 299, and *Supervisors of Schuyler Co.* v. *People, ex rel. R. I. & Alton R. R. Co.*, 25 id. 181.

Mr. C. H. MOORE, for the appellant.

Mr. E. H. PALMER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Wren against the railroad company to recover the value of a cow killed by a passing train, in the town of Clinton. The suit was originally commenced

before a justice and taken by appeal to the Circuit Court, where a jury was waived and the court gave the plaintiff judgment for forty-five dollars.

It is first objected, on behalf of the appellant, that the act of 1857, giving justices of the peace jurisdiction in actions on the case, was not passed by yeas and nays as required by the Constitution, and therefore never became a law. In support of this we are referred to various pages of the printed journal of the house and senate, by which it is sought to trace the facts connected with the passage of the act. The laws certified by the secretary of State, and published by the authority of the State, must be received as having passed the legislature in the manner required by the Constitution unless the contrary clearly appears. If counsel seek to raise the question as to whether the yeas and nays were duly called, it is not sufficient to refer the court to the journal, with the expectation that we are to take judicial notice of all the facts that it discloses. Although we take judicial notice of all acts of the legislature signed by the governor, and found in the office of the secretary of State, and although for some purposes we may take judicial notice of the legislative journals, yet it is not our province, at the suggestion or request of counsel, to undertake to explore these journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature and into the hands of the governor. If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of the legislative journals, and introduce that proof into the record. In the present case we have been referred to the printed journal. We are not aware of any law which makes the printed journal evidence of the contents of the original. But even if it were it is not sufficient to refer us to it. A duly authenticated copy of so much of the original journal as shows the facts relied upon by counsel for impeaching a law *prima facie* valid, must be brought before us through the record. In *Spangler* v. *Jacobi*, 14 Ill. 299, the journals were made a part of the bill of exceptions, and in every case that has hitherto come before this

court, in which questions of this character have been raised, the facts have been presented by the record.

As to the merits of the case before us, a witness called for the plaintiff swears he was standing in the door of a barn watching the approaching train; that he distinctly saw the cow standing still upon the track; that she was in full view of the engineer from the time the train emerged from a cut until it struck the cow, a distance of two or three hundred yards, and that the speed of the train was not slackened. The engineer was sworn, and admits the speed was not slackened, but says the cow was not on the track when he emerged from the cut, but was afterward driven on it by a dog, and so near to the locomotive that he could not avoid running over her. There was a third witness called, but he was not in a position where he could see the cow. The engineer says he was running at about eight or ten miles per hour. If, running at this speed, with a cow in full view, standing on the track, while the train was going two hundred yards, he deliberately ran over her without any attempt to check the speed of his train, which in that distance might so easily have been done, it was gross and willful negligence, for which the company must be held responsible. This court has constantly held, from the *Patchin case*, 16 Ill. 198, to the present time, that gross or willful negligence on the part of the road, will make it liable for injury to an animal, even though the animal be improperly on the track. If, on the other hand, in the case before us, the cow was suddenly driven on the track by a dog, and there was no fault on the part of the engineer, the company would not be responsible. But on this point the two witnesses differ, and there is no ground for saying the court gave credence to the less credible of the two. The plaintiff's witness was disinterested and testified clearly and positively. The judgment must be affirmed.

Judgment affirmed.

Syllabus.

THE TRUSTEES OF THE FIRST CONGREGATIONAL CHURCH
v.
ROBERT STEWART.

1. TRUSTEES — *ownership of property in trust.* The title to trust property vests in the trustees for the use of the beneficiaries, and the law empowers them, and imposes it on them as a duty, to use all reasonable and lawful means to execute the trust reposed in them. And, where the right of property is invaded, and its enjoyment by the beneficiaries is prevented, it is their duty to employ all legal means to protect the beneficiaries in its enjoyment.

2. SAME — *church property — who may occupy it.* Where property is held by trustees for the exclusive use of a particular organization, that body have the right to enjoy it, according to the usages of the church. Even the trustees, much less others, have no power to pervert it to other uses, except in the usual mode of transferring such property. And any attempt to do so may be restrained. Such a body has the right to use it for the purpose of worship, according to the rules for the government of the church. And they have the right to have such worship performed in the manner and by persons designated by the rules and tenets of the church.

3. SAME — *intrusion by other persons.* Other persons cannot lawfully intrude upon such rights. Persons not selected in the mode prescribed by the regulations for the church government, have no right to force themselves into the church, and officiate or conduct the religious exercises; and any one doing so acts in violation of law.

4. DEMURRER — *to bill, admits its truth.* A demurrer admits the truth of a bill. And when it stands admitted that a defendant has no right to officiate as the minister of a church, and has not been engaged for the purpose, and that he is determined to continue to do so in the future unless prevented by force, he may be restrained from the performance of such acts. And, notwithstanding there may be a legal remedy, still, it is not adequate to afford complete relief, as there is no measure of the damages sustained by being deprived of the privilege of worshipping as they prefer. A recovery for the trespass would not cover the whole amount of the damages sustained.

5. RELIGIOUS CONGREGATION — *their rights.* A congregation of religious persons cannot be forced to accept the ministrations of a clergyman not chosen according to the usages of their church, and when a person attempts to force himself upon them they may maintain a bill to restrain such acts.

APPEAL from the Circuit Court of Bond county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Brief for the Appellants.

This was a bill in chancery, filed by the Trustees of the First Congregational Church, in the Bond Circuit Court, against Robert Stewart. The bill alleges that the church is legally incorporated according to law, and that the complainants, as trustees, are entitled to the possession of the church edifice and are in possession of the key to the same; that defendant on different occasions forcibly and against their will and without authority did usurp the right to, and did officiate as the pastor and minister of, the church, contrary to the wishes of a majority of the congregation of the church; that he declared his intention to do so in the future for the next three years unless prevented by physical force.

It further alleges that he had not been hired or employed to act as pastor; that he is neither a member nor a minister of the church, and has no legal or equitable right to act or officiate as such; that the church is unable to procure the services of a minister by reason of defendant's claim of the right to officiate.

The bill prays that defendant may be restrained and enjoined from further acting as such pastor and from further forcibly entering the church. The master granted a temporary injunction. At the return term the defendant filed a demurrer which was sustained by the court and a decree rendered dismissing the bill. To reverse the decree complainants bring the case to this court by appeal.

Messrs. METCALF & GILLESPIE, for the appellants.

The only question presented in this case is this: Admitting the facts alleged in the bill, has a court of equity the right to interfere by way of injunction? If the court decides that a court of equity has jurisdiction on the facts presented in the bill, then the decree of the court below will have to be reversed and cause remanded.

Equity will interfere in cases where the remedy at law is not full and complete, and the amount of damages that might be recovered at law would relieve the parties or be an equivalent for the deprivation of the right set forth in the bill. The

appellee threatens in this case to officiate as such pastor, unless restrained by physical force; in other words, he threatens to commit repeated trespasses. As Justice Story well observes: "Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses; but now there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. If, indeed, courts of equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in the country." Story Eq. Jur. § 928, note 3, and case there cited; *Hanson* v. *Gardiner*, 7 Ves. 310, 311; *Thomas* v. *Oakley*, 18 id. 184.

Equity will interfere for the purpose of preventing a multiplicity of suits and interminable litigation, and in this case suits would have to be brought for trespass committed on each Sabbath day; there would have to be a suit every week; certainly equity would interfere. Story Eq. Jur. § 925.

Now, as to the question of damages to be recovered in each of these suits. It would be no equivalent, for all that could be recovered would be for the damage done to the building, while a congregation would be deprived, by the acts of appellee, of the use of the church for divine worship, as is alleged in bill.

Messrs. DALE & BURNETT, for the appellee.

There is no equity in this bill. Admitting the facts therein to be true, appellants have a complete remedy at law.

Courts of equity will not interfere to restrain the commission of a mere trespass.

If the facts stated in this bill were true, appellee was liable to prosecution under section 147 of the Criminal Code. Scates' Comp. p. 400.

Where a party has a remedy at law, an injunction will not lie. Hilliard on Injunctions, § 23; *Pusey* v. *Wright*, 31 Penn. 396; *Miller et al.* v. *English*, 2 Halstead's Ch. (N. H.) 306.

On a question between two bodies, each claiming to be the trustees of a religious society, and a refusal by one to permit

the other to use the burying grounds, a forcible entry by the latter for that purpose, on several occasions, was not held to be ground for an injunction. *Miller* v. *English*, 2 Halstead's Ch. 306.

MR. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is admitted both by the demurrer, and in argument, that appellants own the property as trustees of the church. This being so, the legal title is vested in them, to be held for the benefit of the *cestuis que use*. And they are empowered by the law, and it is their duty, to use all reasonable and lawful means to execute the trust reposed in them. And, where the right of property is wrongfully invaded, and the enjoyment of the property by the beneficiaries, or any portion of them, is prevented, according to the uses and trusts declared, it becomes the duty of the trustees to employ all necessary legal means to protect them in the enjoyment of the right.

This property was set apart exclusively for the use of the particular organization, for church purposes; and the body have the right to enjoy it, in the mode and according to the usages of the organization. The trustees of the organization itself, or others, have no right to pervert its use contrary to the recognized mode of transferring it to other purposes; and any attempt to do so may be restrained. This body has unquestionably the right to use the property for the purposes of worship, according to the rules for the government of the church; and they have the undoubted right to have religious exercises performed in the manner, and by the persons, designated by the rules and tenets governing the organization.

Nor can others lawfully intrude upon those rights. Persons not selected in the mode prescribed by the church organization have no right to force themselves into their church, and to officiate or conduct the religious exercises of the church; and this is true, whether it be at stated or other periods of worship. Any one doing so, acts in violation of law, and in disregard of the rights of others.

The demurrer, in this case, admits, that appellee has no legal or equitable right to officiate as minister in this church; that he has not been employed for that purpose, and that he is determined to exercise that office to the church unless prevented by force, for three years, to elapse from the time this bill was filed. It is, however, contended, that, although he may have violated the law, and may have committed a trespass, and may intend to commit others, and thus deprive the church of its rights, he is amenable to the courts of law, and not to a court of equity. It is admitted, and such is the undoubted rule of law, that equity may assume jurisdiction even in cases where the law affords a remedy, for the purpose of preventing a multiplicity of suits, or irreparable injury from repeated trespasses. It is, however, urged, that the facts in this case do not bring it within this rule; that, for breaking, entering and occupying this building, damages may be recovered by an action at law, and the same remedy may be applied for each repetition of the trespass. This may be true, and yet there still not be a complete remedy. By what standard can the injury resulting from a deprivation of the exercise of religious privileges and the enjoyment of religious worship be measured? We are aware of no such rule, nor can we imagine one that could exist.

Nor is it an answer to say, that the congregation can enjoy all of the privileges under the ministrations of appellee. Unless they are satisfied with his worship, it would not be worship to them. But, inasmuch as this house is only used at regular recurring periods, and appellee has deprived the congregation of their right to use it on such occasions, and expresses a determination to do so in the future, for a long period to come, we think that a court of equity may take jurisdiction, and restrain the commission of future trespasses, and thereby prevent a multiplicity of suits; and especially so, when repetition of such acts as are charged in the bill, and admitted by the demurrer, are so highly calculated to lead to force and the breach of the peace. We therefore must hold, that the demurrer was improperly sustained to the bill, and that the decree of

the court below must be reversed, and the cause remanded, with leave to appellee to answer the bill, and to establish any legal right he may have to perform the acts from which he insists he should not be enjoined.

Decree reversed.

THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF PENNSYLVANIA, IN MACON COUNTY, ILLINOIS,

v.

JOHN DURHAM.

1. OPENING OF HIGHWAYS — *damages to be adjusted.* The fifty-sixth section of the township organization law of 1861 imperatively requires the commissioners of highways to adjust the question of damages to the owners of land before opening a road across it.

2. SAME — *damages, how adjusted.* The question of damages must be satisfactorily adjusted by release or assessment, or in some other recognized mode, before an owner can be forcibly dispossessed of his property. The act of 1861 does not require the owner to be present and claim damages, as by the old law he was required, but the commissioners, in case they and the owner cannot agree, must assess them at what they may deem just and right, and deposit a statement of the amount assessed with the town-clerk, who shall note the time of filing the same.

3. SAME — *former decision modified.* The decision of the court in the case of *Taylor* v. *Marcy*, 25 Ill. 518, on this subject is modified.

4. CHANCERY — *injunction.* An attempt to open a road in the absence of an adjustment of the question of damages with the owner of improved and cultivated lands, upon which the road is located, will be restrained by a court of chancery.

WRIT OF ERROR to the Circuit Court of Mason county; the Hon. JAMES HARRIOTT, Judge, presiding.

This was a bill in chancery, filed in the Circuit Court of Mason county, at the June Term, 1865, by John Durham, against the commissioners of highways of the town of Pennsylvania, in that county, to restrain them from opening a public highway across certain lands described in the bill, and claimed

by Durham as owner in fee. The lands were alleged to be inclosed and cultivated. The bill alleges, that the preliminary acts of the commissioners in relation to laying out the road were illegal, fraudulent and void. An injunction was prayed and granted. The bill was demurred to, on the ground that the illegal and fraudulent acts, which made the proceedings of the commissioners void, were not set forth in the bill. The demurrer was overruled; but, afterward, the complainant asked and obtained leave to amend his bill.

The amended bill was filed January 27, 1866, and alleges that the commissioners have not complied with the statute, substantially in this: that no petition for the highway was ever signed by twelve legal voters, residing within three miles of the proposed highway; nor copies of the same posted up in three of the most public places in said town; that they gave no notice of any meeting by a majority of them to hear reasons against the laying out of said highway; that the route was never surveyed by a competent surveyor, and a plat of the same, describing it by metes and bounds, courses and distances, and the land over which it passed, and the order of the commissioners declaring it to be a public highway, were filed in the office of the town-clerk; and that the commissioners did not consider what, or whether any, damages were due to the complainant in consequence of the road passing over his land; that they made no order or judgment whatever relative to the damages; and alleges that no release of damages was made by him.

The defendants answered the bill, alleging a substantial compliance with all the requirements of the law, except the adjustment of damages; in regard to which, they aver that the complainant released, or at least waived his right to claim, damages on account of said highway passing over his land, by his own acts and neglect, and is therefore estopped to object to the sufficiency of said proceedings on the ground of damages not having been awarded to him. The complainant filed a replication to the answer.

The cause was tried at the November Term, 1866, of the Mason Circuit Court.

On the hearing, the defendants read in evidence the report and order of the commissioners of highways of Pennsylvania town, laying out the road; also, the report of the surveyor in connection with the order. There was no evidence introduced of any adjustment of damages. The court made the injunction perpetual.

The case is brought to this court by writ of error.

Messrs. LYMAN LACEY and CHARLES A. HARNDEN, for the plaintiffs in error.

Mr. B. S. PRETTYMAN, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the Mason Circuit Court, filed at the June Term, 1863, by John Durham against The Commissioners of Highways of the town of Pennsylvania, in that county, to restrain them from opening a public highway over the lands described in the bill of complaint and claimed by Durham to be owned by him in fee, and to be improved lands, inclosed and cultivated. The bill alleges that the preliminary acts of the commissioners in relation to this highway were illegal, fraudulent and void. The bill was demurred to on the ground that the illegal and fraudulent acts which made the doings of the commissioners void were not set forth in the bill. The demurrer was overruled, but afterward, on motion of complainant, he had leave to amend his bill, which he did, by charging that the commissioners had not complied with the statute in this: that no petition for the highway was ever signed by twelve legal voters residing within three miles of the proposed highway, nor copies of the same posted up in three of the most public places in the town; that they gave no notice of any meeting by a majority of them to hear any reasons against laying out the highway; that the route never was surveyed by a competent surveyor and a plat of the road describing it by metes and bounds, courses and distances, and the land over which it passed, and the order of the commissioners

declaring it to be a public highway was never filed in the office of the town-clerk; that the commissioners did not consider what, or whether any, damages were due to complainant in consequence of the road passing over his land; that they made no order or judgment whatever relative to the damages, and alleges that no release of damages was made by him.

The answer affirms that all these acts and omissions relative to laying out the highway were strictly in accordance with the statute, and fully authorized by it — the omissions alleged in the bill are denied one by one, and they claim that the complainant released, or at least waived, his right to claim damages, by his own acts and neglect, and is therefore estopped to object to the sufficiency of the proceedings on the ground of damages not having been awarded to him.

A replication being put in to the answer, the cause was set for final hearing at the November Term, 1866, at which time a decree was entered making the injunction perpetual, and respondents were forever enjoined from proceeding further in opening or laying out the road, and respondents to pay the costs.

To reverse this decree the cause is brought here by writ of error.

From the record proof offered in evidence by the respondents, preserved in the bill of exceptions, it would appear that no assessment of damages to the owner of the land was had previous to the order for opening the road, nor were any steps taken to assess the damages, if any there were, nor was there any release of damages or any agreement with reference to the damages between the commissioners and complainant. The principal question made here is upon that point.

The plaintiffs in error insist, that the presumption of law is, that the commissioners took into consideration the advantages which the laying out of this road would bring to complainant, and determined that the advantages would fully balance the damages, as by law they are made to do, and this presumption must be overthrown by proof, and that complainant, by neglecting to claim his damages at the hearing of the commission-

ers before the road was laid out, the required notice of the hearing having been given, whatever his rights in the premises may have been originally, he thereby waived and lost all right to have the question of damages considered by the commissioners, and is forever estopped to make any claim therefor, or to object that the road was not legally opened on account of the non-assessment of damages to him.

In support of these positions, counsel cite *Ferris* v. *Ward et al.*, 4 Gilm. 499; *Sangamon County* v. *Brown*, 13 Ill. 208, and *Taylor* v. *Marcy*, 25 id. 518.

Had the proceedings in this case been commenced and conducted in pursuance of the law in force at the time the two first cited cases were decided, they would be conclusive. But these originated under a statute containing provisions essentially different, and wherein, will be specified —

The law in force when the cases from Gilman and from 13 Illinois were decided, contained this provision:

"Viewers, in locating a road, shall ascertain, as far as practicable, where damages will be claimed, and report the names of the individuals claiming to the commissioners' court at the time of making their report; and it shall be incumbent on the owners of property, by themselves or agents, to inform the court at the term at which the road viewers shall report, of such, their claims for damages; and no damages shall be allowed, unless claim be made to the court as aforesaid, or to the supervisor, commissioner or superintendent appointed to open the road as now provided by law; after a road shall be opened, and no claim for damages being set up, the State or county shall not be liable for any damages whatever."

The law of 1861, governing these proceedings, has this provision on the subject of damages: Section 56. The damages sustained by reason of the laying out or opening, or altering any road, may be ascertained by the agreement of the owners and the commissioners of highways, and unless such agreement be made, or the owners of the land shall, in writing, release all claims to damages, the same shall be assessed in the manner hereinafter prescribed, before such road shall be opened, or

worked, or used. In case the commissioners and owners of land claiming damages cannot agree, it shall be the duty of the commissioners to assess the damages at what they may deem just and right to each individual claimant with which they cannot agree, and deposit a statement of the amount of damages so assessed to each individual, with the town-clerk, who shall note the time of filing the same. It shall be the duty of commissioners in all cases of assessing damages to estimate the advantages and benefits the new road or alteration of any old one will confer on complainants (claimants) for the same, as well as the disadvantages. Laws of 1861, p. 256.

This law, as we understand it, expressly requires the commissioners to dispose of one very important incident to the opening of a road, especially through a man's farm, tearing down his fences, exposing his crops, and, it may be, removing his house, to what extent will the owner be damaged? That question must be satisfactorily adjusted by release or assessment, or in some other recognized mode, before an owner can be forcibly dispossessed of his property. The law does not require the owner to be present, and claim damages, as by the old law he was required, but the commissioners, in case they and the owner cannot agree, shall assess them at what they may deem just and right, and deposit a statement of the amount assessed with the town-clerk, who shall note the time of filing the same. This was made necessary, for the reason the law in a previous paragraph had provided, if the damages were not assessed, as therein provided, the proposed road should not be opened, or worked or used, hence the necessity of noting the time when the assessment shall be filed, so that from that date the road might be opened, worked and used.

The proofs in this cause do not show that the commissioners ever entertained the question of damages. They should show affirmatively that this question was passed upon by them, and damages allowed or disallowed, as the case might be. On this subject the statute is imperative.

The case of *Taylor* v. *Marcy*, 25 Ill. 518, reiterates the doctrine of *Ferris* v. *Ward* and *Sangamon County* v. *Brown*,

on which we have commented, and cites them. It is said in that case that the owner having failed to present his claim for damages, he must be estopped afterward to assert it. The court omitted to notice the fact that the proceedings to lay out the road then in question did not originate under the same act as the cases cited, but arose under the township organization act of 1851, the sixth section of which is precisely the same as the fifty-sixth section of the act of 1861, above quoted. Scates' Comp. 354.

This being so, that case has no bearing upon this, on this question of damages, and the decision of that must be modified by this.

There being nothing shown by these commissioners that the question of damages had been adjusted in the mode pointed out, they had no power to order the road to be opened, and, in attempting to open it in the absence of this adjustment, they might have inflicted an injury upon the claimant of the most serious character, which the tardy process of the law could but poorly remedy, and which demanded the instant appeal to the restraining arm of a court of chancery. His remedy was not adequate at law—it was not prompt, such as the emergency required, and in that court he could obtain no adequate relief. By delays there his fences and his crops might be destroyed, and his peace violated to such an extent that pecuniary compensation would not relieve.

There being no error in the record the decree must be affirmed.

Decree affirmed.

ELAM M. SANFORD
v.
ELIZABETH RAWLINGS.

1. EXPERTS—*latent ambiguity.* Where evidence is introduced on a trial to show the terms of a contract for the erection of a marble monument, it is error to call other witnesses, who are dealers or workmen in marble, and to

ask them, "What, in the trade of a marble dealer, is meant by a contract to erect a monument?"

2. SAME—*meaning of contract.* It is wholly unnecessary to call a workman in marble to prove the legal import of a contract "to erect a monument," or what would be understood by such a contract in the trade, because there could be no dispute as to its meaning. The law would attach to this language a precise signification.

3. CONTRACTS—*must be shown by the language and acts of the parties.* What a contract is must be shown by the language and acts of the parties, and not by proving what is the custom of dealers and workmen as to their mode of executing particular contracts.

APPEAL from the Circuit Court of Morgan county; the Hon. D. M. WOODSON, Judge, presiding.

This was an action of assumpsit, brought by Elam M. Sanford against Elizabeth Rawlings, to recover the value of a marble monument, furnished by the former to the latter, to be erected over the grave of her deceased husband.

The case was tried at the March Term, A. D. 1866, of the Morgan Circuit Court. The jury found a verdict in favor of the defendant, upon which judgment was rendered by the court. The case is brought here by appeal.

The facts of the case are stated in the opinion.

Mr. H. J. ATKINS, for the appellant.

Mr. H. E. DUMMER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Sanford against Elizabeth Rawlings, to recover the value of a marble monument, sold by the former to the latter, to be erected on the grave of her deceased husband. The monument, having been finished in the plaintiff's shop at Jacksonville, was taken away by the son of the defendant, and soon afterward the plaintiff went to the residence of the defendant, in Cass county, to superintend its erection. The monument was broken in the process of erection, and the defendant, insisting that it had never been fully

delivered and was still at the risk of the plaintiff, refused payment.

The chief question in controversy on the trial was, whether, by the terms of the contract between the parties, the plaintiff was merely to make and deliver a monument at his shop, and to assist at its subsequent erection, or whether he was to erect the monument before it was to be considered as delivered. On this point the evidence was conflicting — one of the plaintiff's workmen testifying that the monument was to be delivered at the shop, and that the defendant agreed to receive it there, while a son of the defendant swore, that the plaintiff contracted to make and erect the monument. After this testimony was heard, the defendant was permitted to call, as witnesses, two dealers and workmen in marble, and to ask them what, in the trade of a marble dealer, was meant by a contract to erect a monument? The admission of the testimony drawn out by this answer, against the objections of the defendant, is assigned for error, and is well assigned.

It is sought to justify this evidence, on the ground that it was admissible to explain a latent ambiguity. But there was no latent ambiguity to be explained. The controversy was, not as to the meaning to be attached to certain terms admitted to have been used by the parties in making their contract, but as to what precise terms had been in fact used. It was wholly unnecessary to call a worker in marble to prove the legal import of a contract to erect a monument, or what would be understood by such a contract in the trade, because there could be no dispute as to its meaning. The law would attach to this language a precise signification. But proof of the meaning of a contract to erect a monument would certainly tend, in no degree, to shed light upon the question, whether this plaintiff had made a contract of that kind, or one altogether different, and this was the point really at issue between these parties. What the contract was must be shown by the language and acts of the parties, and not by proving what is the custom of marble dealers as to their mode of executing particular contracts. *Sigsworth* v. *McIntyre*, 18 Ill. 128.

Neither can it be said that the testimony, if improper, was still harmless. It would tend to mislead the jury, because the court, in permitting the question to be asked, virtually assumes that the contract, whose meaning is inquired after, is the one that has been proven. It is almost certain that a jury would draw an inference from this evidence unfavorable to the plaintiff. The judgment must be reversed and the cause remanded.

Judgment reversed.

MATTHEW M. DODDS *et al.*

v.

JAMES M. BOARD.

1. ARREST—*justification.* A private individual may arrest a person guilty of crime, when it is necessary to prevent the escape of the accused, and have him taken before the proper officer for examination. But such a person cannot justify such arrest upon the ground of a suspicion of guilt only—guilt in such a case must be shown. It is otherwise with a peace officer authorized to make arrests, as he may arrest without a warrant where all the facts show that there was strong probable cause to believe that the accused was guilty.

2. Where a number of persons suspect a person of being guilty of crime, and induce a peace officer to make an arrest, without a warrant, they cannot justify their action by showing probable cause to believe him guilty; to do so, they must show guilt. In such a case the officer would, it seems, be justified.

3. Where a crime has been committed, and the party arrested is guilty, and private individuals induce a peace officer to make the arrest, they, as well as the officer, will be justified by showing the guilt.

WRIT OF ERROR to the Circuit Court of Edgar county; the HON. JUSTIN HARLAN, Judge, presiding.

This was an action of trespass *vi et armis* brought by James M. Board, in the Edgar Circuit Court, against Matthew M. Dodds, John J. Logan, Fergus M. Blair and Ephraim S. Wolf. The declaration proceeded for an assault and battery, by illegally arresting plaintiff and falsely imprisoning him. Each of the defendants, except Logan, filed separate pleas of not guilty.

Logan filed a plea of justification, which is the fourth in the series, averring that he had been informed that plaintiff was guilty, as an accessory to a larceny which had been recently committed, and that he was idle and associated with persons of bad character, whereby he suspected him of being guilty of the crime, and arrested him, using no more force than was necessary, and took him before an officer for examination on the charge of larceny.

The defendants, except Logan, filed a fifth plea, in which they aver that they believed, and had probable grounds to believe, that plaintiff was guilty of a larceny then recently committed, from his association with persons of bad character, and for that reason procured Logan as a peace officer to arrest him, and have him taken before a proper officer for examination on the charge of larceny.

The sixth plea is by all of the defendants, and avers that plaintiff associated with persons of bad character, who had been guilty of crime, and a larceny had been recently committed, and that plaintiff, with others, were guilty of the crime, and that they procured Logan, who was a peace officer, to arrest him and take him before two justices of the peace for examination on the charge.

Plaintiff demurred to these several special pleas. Afterward plaintiff entered a *nolle prosequi* as to Wolf. The court at a subsequent term sustained the demurrer to each of these pleas. And defendants failing to further defend, a jury were impanneled, and, after hearing the evidence, assessed plaintiff's damages at $591, for which sum the court rendered judgment, and defendants prosecute this writ of error and complain of the judgment of the court in sustaining the demurrer to the pleas.

Mr. JAMES A. EADS, for the plaintiffs in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

The assignment of errors questions the decision of the court below in sustaining the demurrer to the fourth, fifth and sixth

pleas filed by defendants below. The fourth plea is intended as a plea of justification. It was pleaded alone by Logan. It avers that plaintiff was an idle person, and consorted with persons of known bad character, and that a larceny had been recently committed in the neighborhood, and that he had been informed that plaintiff was accessory to the crime, and that he believed, and had probable cause for believing, that he was guilty, and had therefore arrested him and taken him before two justices of the peace and had him examined on the charge. This plea as a defense is defective in not stating that Logan was a peace officer authorized to make arrests of persons guilty of crime, if intended as a justification by such an officer. If intended as a justification as a private individual, it should, to constitute a bar, have averred the guilt of plaintiff; the demurrer was, therefore, properly sustained to this plea.

The fifth was intended as a justification to the other defendants, upon the grounds, that they suspected plaintiff of being guilty of a larceny which had been recently committed, and had induced Logan, who was a peace officer, to arrest plaintiff and take him before two justices of the peace to have him examined on the charge, without Logan's having a warrant for the arrest of plaintiff. To authorize an officer, without a warrant, to arrest a person on suspicion that he is guilty of crime, there must be such circumstances of suspicion that the party arrested was guilty, as renders it probable that the accused had committed the crime. But it is necessary that the plea should aver, that the party making the arrest was an officer authorized to make arrests. In this the plea is defective in not averring that the defendant Logan was a constable, as a private person has no right to arrest on mere suspicion. And there should also be an averment, that it was necessary for the officer to make the arrest to prevent the accused from escaping. To this extent all of the authorities go, it is believed, without conflict. But we are not prepared to hold, that a mere suspicion of guilt shall authorize all persons, without a warrant, to make an arrest. To so hold would, we have no doubt, lead

to breaches of the peace, and produce crime, to an equal or greater extent than would be thus prevented.

This plea seeks to justify the arrest upon the ground that plaintiffs in error suspected defendant in error of being guilty of a larceny, and had for that reason induced a constable to make the arrest without a warrant. To hold this plea good, as a justification to the persons causing the arrest, would be to hold that private individuals might arrest on probable cause to believe that the party was guilty, as the arrest thus caused is, in principle, precisely the same as if the arrest had been made by a private person. The mere fact that they induced even an officer, without a warrant, to make the arrest does not protect them. They do not act under the direction of the officer, but he under theirs. While in such a case the officer, acting upon facts reasonably calculated to raise the presumption of guilt, would no doubt be protected, the party causing him to make the arrest would not be unless guilt were shown. There are, no doubt, cases which hold that private individuals may arrest on probable cause, but there are authorities which hold the contrary rule. And in the conflict of authority we are left free to adopt the rule which seems to be most consonant with reason and the public interest. And, to prevent breaches of the peace, and even bloodshed, we think that a private individual should not be justified, unless a crime has been committed and the person arrested shall be shown to be the guilty party. This fifth plea was, therefore, insufficient, and to it the demurrer was properly sustained.

From what has already been said, it follows, that the sixth plea presented a defense to the action. It avers that a larceny was committed and that plaintiff was guilty, and being so, the other defendants caused Logan, who was a peace officer, to make the arrest, using no more force than was necessary; and that when he was arrested he was taken before the proper officers for examination, and was detained in custody no longer than was necessary for that purpose. The law is believed to be well settled that a peace officer may justify an arrest by showing that the plaintiff was guilty of the crime for which the

arrest was made. And, as we have seen, private individuals may arrest persons guilty of crime and have them examined by the proper officer. *Stonehouse* v. *Elliott*, 6 T. 315; Hawkins' Pleas of the Crown, vol. 2, ch. 12, § 18. It then follows, that, if plaintiff was guilty, as admitted by the demurrer, the officer might, on his own motion, or at the request of his co-defendants, make the arrest without a warrant, provided it did not result in a breach of the peace. The demurrer was improperly sustained to this plea, and the judgment of the court below is reversed and the cause remanded with leave to amend the other pleas.

Judgment reversed.

Murray McConnel
v.
John H. Dickson *et al.*

1. Mortgage—*construction of condition.* A. C. D. and G. M. M., partners under name of A. C. D. & Co., being indebted to C. R. H. for lumber, gave their four notes for the same, dated January 15, 1860,—one for $4,000, due in thirty-three days; one for $3,870, due in six months; the third for $3,870, due November 15, 1860; and the fourth for $4,070, due February 15, 1861; M. M. signed each of said notes as security. A. C. D. and wife, for the purpose of securing M. M., executed to him a mortgage, which recites all the notes, the dates, and sums for which given, and the day each note becomes due; and after this recital contains this condition: "The said A. C. D. is bound to pay one-half of all and each of said several notes, and the said G. M. M. is bound to pay the other half thereof. Now if the said A. C. D. shall well and truly pay his said one-half of each of said notes when due, then this deed shall from thence forward be null and void; it being hereby fully understood that this deed of mortgage is to secure said M. M. against the payment of A. C. D.'s half of said notes only."

Held, that the payment of one-half of the whole sum due upon all the notes by A. C. D. was a performance of the condition, and discharged the mortgage.

2. Security—*upon payment of debt becomes a simple creditor.* Where a security for a firm pays the debt, he becomes the creditor of the firm, and is entitled to no greater rights than any other simple contract creditor of the same firm.

3. Chancery—*jurisdiction—remedy at law must first be exhausted.* Where a security pays the debt, he has no right to come into a court of chancery, in the first instance, seeking to subject the assets of the principal to the payment of his debt. Chancery has no jurisdiction in any such case. The remedy of the security is complete and ample at law.

4. Same—*rights of creditors.* The rule is inflexible, that a creditor must exhaust his remedy at law, before he can come into a court of chancery to reach equitable assets, or set aside a fraudulent conveyance.

Appeal from the Circuit Court of Morgan county; the Hon. David M. Woodson, Judge, presiding.

This was a bill in chancery, filed by Murray McConnel in the Circuit Court of Morgan county, against John H. Dickson, A. C. Dickson and George M. McConnel, alleging that John H. & A. C. Dickson, and Geo. M. McConnel, in February, 1860, entered into partnership, under the firm name of A. C. Dickson & Co. That said firm purchased of Charles R. Hurst lumber, and gave him four several notes, dated January 15, 1860,—one note due thirty-three days from date for $4,000, one note at six months for $3,870; third due November 15, 1860, for $3,870, and fourth note for $4,070, due February 15, 1861. That complainant signed each of said notes as security. That A. C. Dickson and wife, for the purpose of securing the complainant, executed a mortgage on certain lands in Jacksonville, and alleging that the condition of the mortgage was to secure him in one-half of whatever sum he might pay on said notes.

Charges that the firm of A. C. Dickson & Co. was dissolved November 19, 1860, and, by agreement, John H. Dickson took possession of the firm assets, and had not paid the firm debts.

That, on May 31, 1861, A. C. Dickson and wife conveyed the mortgaged premises to John H. Dickson. Charges that neither party has property in Illinois, and that complainant had no remedy at law. Bill prayed for foreclosure and sale of mortgaged premises to pay $2,694.90.

The condition of the mortgage recites the making of said notes by the said firm, consisting of A. C. Dickson & Geo. M. McConnel, and recites, that "The said Dickson is bound to pay,

one-half of all of and each of said several notes, and the said Geo. M. McConnel is bound to pay the other half thereof. Now if the said Dickson shall well and wholly pay his said one-half of each of said notes when due, then this one shall from thenceforward be null and void, it being hereby fully understood that this deed of mortgage is to secure said McConnel against the payment of Dickson's half of said notes only." The contract of dissolution of said firm is set out in the bill; summons was issued and returned served on Geo. McConnel; the other defendants were made parties by publication.

John H. Dickson filed his separate answer October 12, 1864, admitting the execution of the notes by the other defendants; and of the mortgage by A. C. Dickson and wife; and that, at a subsequent date, he bought an interest in the firm, and then signed said notes. Alleges that the mortgage was only to secure payment of one-half of said notes. States that the first and second notes were paid by the firm; and that on March 3, 1863, respondent paid to the holder $5,100, on the other two notes, out of the proceeds of the sale of A. C. Dickson's separate property, being part of the mortgaged property released from the same, which paid the fourth note of $4,070, and all of the third note but a little over $2,500; and that this sum fully paid off said mortgage. Admits conveyance of the property, to the respondent, subject to the mortgage; and alleges, that it was for a full consideration. Says that the respondent had sold the same, and Matilda E. Dickson had an interest in the property, and was a necessary party; and prays that the bill be dismissed. Complainant excepted to the answer, first, because the answer set up no defense to the bill; and second, because Mrs. Dickson could not acquire any interest in said property, to the prejudice of the complainant. Exception overruled; and complainant asked leave to make Matilda E. Dickson and H. E. Dummer parties defendant; and by leave of the court filed his amended bill, praying that Matilda E. Dickson answer and state what interest she had in said property; and alleging that she had relinquished her homestead in said property; and that the deed to her was fraudulent and void, as to the com-

plainant; and charging that she was the wife of defendant, A. C. Dickson; and asked that she be required to answer and say from whom she acquired title; and the consideration she paid for the same; and alleging that John H. Dickson paid no consideration for said deed; but held the same for the use, and to be applied to payment of Hurst's notes; and that John H. Dickson was trustee for the complainant, in holding said real estate; and that John H. Dickson refused to carry out said trust; that John H. Dickson held assets of the firm of A. C. Dickson & Co., and had not settled the debts. Charges that J. H. Dickson has conveyed property to H. E. Dummer, who has possession of the same. Charges that Geo. M. McConnel is insolvent. Claims right to have this real estate sold under decree to pay the alleged debt due him. Claims that he has no remedy at law, and has a remedy in equity. Claims that Matilda E. Dickson cannot hold any interest in the same as against complainant. Claims that John H. Dickson shall account for any assets he may have received from the firm of A. C. Dickson & Co.

John H. Dickson filed his separate answer to the amended bill; alleging that he paid A. C. Dickson for the deed of May 31, 1866, $2,900, and over for said property; taking the same subject to the mortgage of the complainant. Says that at that time suit was pending by M. E. Dickson against A. C. Dickson, for divorce and alimony, and an injunction sued out and served, restraining A. C. Dickson from selling said property. That Mrs. A. C. Dickson agreed to said sale, and joined in said deed, upon the understanding that the respondent should allow her to occupy the same until sold, and after payment of the money paid by the respondent, and ten per cent interest, and taxes, and whatever might be due on the mortgage, the balance was to be paid to her; that respondent took said deed and agreed to said terms with said Matilda, and put her in possession. Says he sold part of said real estate for $5,100, and paid the same on the third and fourth notes; the first and second having been paid by the firm; which more than paid by A. C. Dickson's one-half of said notes; and that mortgage was paid. That Geo. M. McConnel was behind with said firm; that, that

sum paid, not only overpaid A. C. Dickson's part, but respondent's also. Denies all fraud. Says that amended bill is multifarious; and that respondent is not bound to swear to that part of the same in regard to the assets of the firm of A. C. Dickson & Co.; and that complainant has full remedy at law. Says that Matilda E. Dickson and A. C. Dickson were divorced under proceedings of the Morgan Circuit Court, and prays that the bill be dismissed. Answer sworn to. Matilda E. Dickson answered, stating substantially the same facts in relation to sale of mortgaged premises, as those mentioned in answer of J. H. Dickson; and claims that she is entitled to the remainder of the proceeds of the sale, after payment of the balance due on the mortgage, and the debt, interest and taxes to John H. Dickson. That she had asserted her claims in the courts before complainant acquired any rights; that she was entitled to dower and homestead in said premises, which she had released on consideration of the undertakings of J. H. Dickson; that she was entitled to have all of said proceeds, over and above $3,824.98½, being *one-half of* sum due on the mortgage, but that she had consented that $5,100 might be, and the same was, applied on same. Answer sworn to.

Complainant April 13, 1866, asked leave to file a supplemental bill, and moved for a rule on J. H. and M. E. Dickson, to answer the same; and said defendants entered a cross motion to strike the supplemental bill from the files, the motion and cross motion were submitted to be decided in vacation. The supplemental bill reiterates the charges in the original and amended bills; and charges that the deed to John H. Dickson was fraudulent and void; and that the firm of A. C. Dickson & Co. were insolvent. That he has a right to come into equity without resorting to law, and prays that the deed be set aside.

At the May Special Term the court sustained the motion of the defendants to strike the supplemental bill from the files; and overruled the motion for a rule to answer. Complainant excepted and filed a replication, and the cause was set down for hearing at next term.

Dummer answered, saying he had purchased part of the

property, and that, by stipulation, a part of the purchase money was unpaid until this suit was determined.

AGREED EVIDENCE.

Agreed that notes were originally given by A. C. Dickson & G. M. McConnel, as firm of A. C. Dickson & Co., with the complainant as security. Mortgage was given at date of notes. Afterward J. H. Dickson was admitted a member of the firm. First and second notes were paid by the firm, with the funds of the firm, and a part of the third note was also paid by the firm.

On March 3d, 1864, J. H. Dickson by his attorney, paid $5,100 on the last two notes, out of the proceeds of sale of mortgaged property sold, except lot 75 and E. ½ 76, in Chandler's addition to Jacksonville, described in the bill. This sum paid all of said Hurst debt except $2,535.75, balance due March 3, 1863. This last sum was paid by McConnel at a subsequent date, with accrued interest. At the time of the payment of the $5,100, the fourth note for $4,070 was surrendered, leaving third note outstanding, with balance as aforesaid unpaid.

Deed from A. C. Dickson and wife to John H. Dickson is admitted, and included all of A. C. Dickson's real estate, except ten acres of land in Chicago, which last had been sold on *fi. fa.*, before the complainant paid Hurst.

Admitted that firm of A. C. Dickson & Co. dissolved Nov. 19, 1860, and assets went into the hands of J. H. Dickson; that J. H. Dickson and M. E. Dickson had sold the lots in Chandler's addition to Jacksonville, to Dummer; that $3,000 remained unpaid on purchase money; that all the mortgaged property was sold by J. H. Dickson except said lot for $5,100, and the proceeds applied as stated in J. H. Dickson's answer; that, prior to the date of the deed of May 31, 1861, proceedings were pending between M. E. Dickson and A. C. Dickson for divorce and alimony; and A. C. Dickson had been enjoined from selling his property; that M. E. Dickson consented to said sale to J. H. Dickson on condition that he would provide for her in the manner mentioned in the answer of the defend-

ants; that J. H. Dickson paid for said deed $2,925.88; and took said deed subject to whatever might be due on said mortgage, and then gave his bond to G. W. S. Callen as trustee, as mentioned in the answer of defendants; that a decree was subsequently entered, divorcing Matilda E. Dickson from the defendant, A. C. Dickson. It is admitted that the complainant has obtained no judgment at law against any of the members of said firm; nor instituted any suit on said demand against any member of the same; for the purposes of this suit, only, it is admitted that said firm are insolvent. Said papers were admitted, and either party to have the right to except to any of said papers as legally admissible; the court, on a hearing of the cause, dismissed complainant's bills; the cause is brought to this court by appeal.

Murray McConnel, *pro se.*

It is anticipated that the defendants will attempt to deny the jurisdiction of the Court of Chancery over this case, upon the ground that it is in the nature of a creditor's bill against the firm of A. C. Dickson & Co., and that the complainant should have first resorted to a court of law and obtained a judgment and execution.

This is not what is technically known as a creditor's bill, but in a creditor's bill it is not always necessary to show that the creditor has sued, and got a judgment and execution at law, before applying to chancery. The original bill in this case was filed to procure a construction of, and to foreclose, the mortgage made by A. C. Dickson and wife to complainant. The Court of Chancery certainly had original jurisdiction for this object.

The second object of the bill was to require John H. Dickson, as the trustee of the firm of A. C. Dickson & Co., to account for the property received by him from said firm on the 19th of November, 1860, as shown by his written contract, signed by all the parties of said firm, by which said John H. Dickson bound himself to sell said property and pay the debts of the firm.

The Court of Chancery had original jurisdiction over this question, and any one of the creditors of A. C. Dickson & Co. had a right to file a bill requiring said trustee to account for said property, and carry out the terms of said trust by paying the debts so far as those assets would do so, without first resorting to a court of law, and upon this point the following authorities are referred to: *Russell* v. *Clark, Exr.*, 7 Cranch, 97, 98; *S. C.*, 2 Curtis' Decisions U. S. Supreme Court, 462, 467; Story's Equity Jurisprudence, § 64 K; *Leach* v. *Thomas*, 27 Ill. 461; *Thorp et al.* v. *McCullum et al.*, 1 Gilm. 625; *Kimball* v. *Mulhern et al.*, 15 Ill. 208.

Messrs. Morrison & Epler, for the appellees.

Matilda E. Dickson, having executed the mortgage, was an indispensable party to a bill to foreclose the same. Yet Mrs. Dickson was in no wise related to or connected with the unsettled affairs of the firm of A. C. Dickson & Co., and therefore could not be made a party to a bill to settle affairs of that firm. The original and amended bill, having sought to foreclose the mortgage, and also to compel John H. Dickson to account for assets of A. C. Dickson & Co., was multifarious and should have been dismissed. See *Supervisors of Whitesides Co.* v. *States' Attorney*, 31 Ill. 68; *Finch* v. *Martin*, 19 id. 111.

But it is clear that complainant cannot maintain his standing in a court of equity. By payment of the money as security for the firm of A. C. Dickson & Co., he became a simple contract creditor of the firm, and, to enable him to proceed against equitable assets, supposing there be such assets, it is indispensable that he exhaust his remedy at law. He must obtain judgment and sue out execution. See *Bigelow* v. *Andress*, 31 Ill. 322; *Greenway* v. *Thomas*, 14 id. 271; *Miller* v. *Davidson*, 3 Gilm. 515; *Ohling* v. *Luitjens*, 32 Ill. 23. Complainant cannot relieve himself from this necessity by alleging insolvency of defendants. The bill charges that the conveyance to Matilda Dickson was fraudulent and void. If so, a judgment at law would have reached the property conveyed. *Greenway* v. *Thomas*, 14 Ill. 271.

The court below had no jurisdiction. The objection was taken to the original and amended bills, and they were prop erly dismissed.

Mr. Justice Breese delivered the opinion of the Court:

The appellant in this case was the security on four certain notes executed on behalf of the firm of A. C. Dickson & Co., lumber merchants, of St. Louis, to Charles R. Hurst. This firm was composed of A. C. and John H. Dickson and George M. McConnel, who signed the notes by their individual names. To secure appellant, A. C. Dickson, then the owner of valuable real estate in Jacksonville, his wife, in February, 1860, while the notes were maturing, executed to complainant a mortgage upon this Jacksonville property. The mortgage recites all of these notes, the dates and sums for which given, and the day each note became due, and contains this condition after their recital. That the said A. C. Dickson is bound to pay one-half of all and each of said several notes, and the said George M. McConnel is bound to pay the other half thereof. Now, if the said Dickson shall well and truly pay his said one-half of said notes when due, then this deed shall from thence-forward be null and void, it being hereby fully understood that the said mortgage is to secure said George M. McConnel against the payment of one-half of said notes only, as aforesaid."

The controversy arises in the first instance on the construction to be placed on this clause of the mortgage, appellant contending that Dickson was to pay one-half of each note, *eo nomine*, and that the fact that he has paid one-half of the whole sum due upon all the notes is no performance of the condition.

It is very evident to our minds, from the terms of this condition, especially the last clause of it, that it was the intention of these parties that whenever one-half the debt specified by these notes was paid by Dickson, the mortgage was to be null and void. All that Dickson designed to secure appellant in was one-half of this Hurst debt,—it was to secure that that the

mortgage was executed, and, although he agreed to pay one-half of each note, he never agreed to pay more than one-half of the debt of which those notes were the evidence. Having paid one-half of this debt due by those notes, before the bill was filed, complainant was not entitled to any decree, there being nothing due on the mortgage.

It appears by the pleadings, that in November, 1860, the firm of A. C. Dickson & Co. made an assignment of all the property of the firm to the partner, John H. Dickson, and dissolved. John H. accepted the trust, and took possession of a large amount of property included in the assignment, stated in the bill to be of the value of $15,000, and entered into a written contract to sell the same on certain terms of credit, at auction, and to collect and use the proceeds to pay all the debts of the firm, these Hurst notes included, the third note, payable to Hurst for $3,870, being then not fully paid. It is alleged that the assignee sold this property and applied the proceeds to his own use, and in May, 1861, A. C. Dickson and wife conveyed by deed to the same John H. Dickson all the real estate described in the mortgage to complainant, and A. C. Dickson then became insolvent, and had no property subject to execution, and left the State, and that John H. was also insolvent, and was endeavoring to sell all this property and to defraud the complainant out of the money he had paid as security, and that George M. McConnel is insolvent.

The complainant sought by his bill (he having paid the balance of the third note, being about nine hundred dollars, to Hurst, as security for the firm,) to be substituted in the place of Hurst, and to be entitled to all his remedies as against the assets in the hands of Dickson, the assignee.

A plain answer and refutation of this claim of complainant exists in the fact that there is no place for such subrogation, for when Hurst was paid by complainant, Hurst ceased to have any interest in the assets. The doctrine, as cited from 7 Cranch, 69, *Russell* v. *Clark's executors*, has not the slightest application to this case. In that it is said, and correctly, that the person for whose benefit a trust is created, who is to be the

ultimate receiver of the money, may sustain a suit in equity to have it paid directly to him. But that is not this case. Here the complainant stands as a creditor of this firm, he having paid Hurst a debt they were bound to pay, and in this respect he stands in no different or better position than thousands of persons who have paid debts for which they were security. On paying the debt complainant became the creditor of the firm, and entitled to no greater rights than any other simple contract creditor of the same firm. The case is yet to be found, adjudged by any respectable court, recognizing the right of such a creditor to come into a court of chancery, in the first instance, seeking to subject the assets of the firm to the payment of his debt. Chancery has no jurisdiction in any such case.

The remedy of the complainant is complete and ample at law. When he shall have obtained judgment against the firm for this money so laid out and expended for their use, he can levy his execution on this property, alleged to have been fraudulently assigned and appropriated by the assignee to his own use. This fraud, if proved, would not protect the assignment. If the assignee has conveyed it to innocent parties, or fraudulently, and no fruits follow an execution, then complainant can come in with his bill of complaint, known as a creditor's bill, and pursue the property. To this effect, are sections 36 and 37 of our Chancery Code; and such is the course of proceeding in all the States of this Union and in England. The rule is inflexible in such cases, that a creditor must exhaust his remedy at law before he can come into a court of chancery to reach equitable assets, or set aside a fraudulent conveyance. Cases are abundant on this point. We cite a few of them. *Stone* v. *Manning*, 2 Scam. 531; *Miller* v. *Davidson*, 3 Gilm. 518; *Manchester* v. *McKee, Exr.*, 4 id. 511; *Bigelow* v. *Andress*, 31 Ill. 330.

Complainant had the right to file a bill against John H. Dickson, as assignee of the partnership, to compel performance of the trust, but he does not show there are any partnership assets. He is simply a creditor of the firm to the extent of the debt paid by him to Hurst, but before he can maintain a bill in chancery to reach equitable assets, or to set aside a fraudu-

lent conveyance, he must exhaust his remedy at law. The scope of the second amended and supplemental bills being for relief solely on the last ground, the court did not err in dismissing the bill.

These views render it unnecessary to consider the question of the validity of A. C. Dickson's deed for the use of his wife, or the deed to Dummer, or any question made to which these give rise, as the complainant is not in a position to attack any of them.

For the reasons given the decree of the Circuit Court must be affirmed.

Decree affirmed.

ANDREW J. COX
v.
JOHN MONTGOMERY.

LACHES—*what will be considered.* Where a party files a bill to avoid a contract for the sale of land within ten months from the time the fraud was discovered, and that delay is explained by the fact that he was advised by counsel to postpone the commencement of a suit until the decision of another then pending, it is not such *laches* as would bar his relief.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This case was heard in the Supreme Court at the January Term, 1865, and remanded for the purpose of allowing the appellee to explain, if he could, the reason of the delay in the institution of his suit. The case is reported in 36 Ill. 396.

At the February Term, 1866, of the Circuit Court of Iroquois county, the cause was again tried, and the court found that the suit had been instituted without any reasonable delay, and decreed that the conveyance be set aside, etc., as in the former decree. The defendants appealed to this court.

The contract sought to be rescinded was made in January, 1862, the alleged fraud discovered about the 10th of July

following. A short time after, the complainant went to the office of Wood & Long, attorneys, and was advised that his cause was somewhat doubtful, and that he had better defer bringing suit until a case they then had pending in court, of a similar character, was decided. The complainant had the ague during the fall of 1862, and was taken very sick about the 7th of January, 1863, and confined to his bed till April following. On the 20th of April, he went to Middleport, and procured an attorney named Washington to prepare and file a bill. This bill was filed on the 2d day of May, 1863; and on the 27th of November following, it was dismissed; and the bill in the present case immediately filed.

Messrs. GEORGE B. JOINER and WOOD & LONG, for the appellant.

Messrs. ROFF & DOYLE, for the appellee.

Per CURIAM: When this case was formerly before the court, as reported in 36 Ill. 396, we held Cox had committed a fraud on Montgomery in the exchange of lands, which entitled the latter to a rescission of the contract, if he could explain the apparent delay in commencing proceedings for that purpose, and we remanded the case to allow such explanation to be made. It now appears, that Montgomery filed his first bill on the 2d of May, 1863, and that bill having been dismissed on the 27th of November, 1863, the present bill was filed on that day. Less than ten months intervened between the time when Montgomery first acquired knowledge of the fraud and the institution of a suit, and that delay is explained by the fact, that he was advised by counsel to postpone the commencement of a suit until the decision of another then pending. We are of opinion this was not such *laches* as should bar his relief, and the Circuit Court thus held.

It is urged, however, by the appellant, that he was entitled to payment for his improvements, which appear, by the record, to have been worth about one hundred and twenty-five dollars, as also to interest on the $300 and taxes. If this was an error, it

is one which has worked the appellant no injury, and for which we do not deem it necessary to remand this cause, since, if such an account had been taken, the appellee would have been entitled to claim rents and profits, and it is manifest, from the record before us, that these would more than overbalance the claims of the appellant. The decree is affirmed.

Decree affirmed.

O. G. MILLISON, for the use, etc.,

v.

ELI O. FISK.

1. GARNISHEE—*money in the custody of the law.* As a general rule, money which is in the custody of the law is not liable to be reached by garnishee process. It has been held, that money collected on execution and in the hands of a sheriff cannot be reached on garnishee process. So of money in his hands on the redemption of lands sold on execution. It has been held by other courts, that money cannot be so reached, in the hands of selectmen due a school teacher, in the hands of a public officer, held in his official capacity; so of money in the hands of a clerk; likewise in the hands of an administrator; the same of money in the hands of a United States marshal, and in the hands of the treasurer of a board of school directors for the payment of teachers, and was held not to be a debt due from the treasurer to the teacher.

2. The rule seems to be, that a person deriving his authority from the law to receive and hold money or property cannot be garnisheed for the same; because the money or property is in the custody or control of the law, and while it so continues it does not belong to the debtor. While it so remains, the law may control it, and it may never be paid to the debtor in execution.

3. SAME—*money in the hands of the school treasurer.* Where it appeared, that a teacher's schedules had been placed in the hands of a township school treasurer, for teaching in a district, and there were funds in the hands of the treasurer subject to be apportioned to that and other districts, but had not been when the garnishee process was served, but a portion of the fund was subsequently apportioned to the district and ordered to be paid on these schedules; *Held*, that the money was not liable to be garnisheed at the time of service, nor did it become so on that service, by the subsequent appropriation, whatever might have been the effect of a service after the order for its

payment and before its payment to the debtor in the garnishee proceeding. Nor can school directors be garnisheed for funds not in their hands or under their control.

APPEAL from the Circuit Court of Mason county; the Hon. JAMES HARRIOTT, Judge, presiding.

On the 28th day of March, 1865, John B. Wright filed the requisite affidavit, upon which a garnishee summons issued against George Williamson, Jacob Mowder and James Blakeley, school directors of school-district No. 4, Township 21, N. Range, 8 E., and Eli C. Fisk, township treasurer, which was served on each of them. This proceeding was heard upon an affidavit, from which it appeared, that, at the March Term, 1865, of the Mason Circuit Court, John B. Wright recovered a judgment for the sum of $152.50, against O. G. Millison. That on the 27th of March, 1865, execution was issued thereon to the sheriff to execute. It was returned by him, on the next day, indorsed "no property found."

At the October Term following, Fisk filed his answer to interrogatories which had been exhibited in the case. In his answer he stated that he had in his hands as treasurer of the township, and that were left in his possession two schedules calling for $131.25 in the aggregate, to pay which there was in his hands only $104.59, leaving a balance of $26.66, to be paid in April, 1866, the money to be paid to Millison as teacher in district No. 4, in that township.

At the October Term, 1865, the cause was tried by the court without the intervention of a jury, by consent of the parties. On the trial Fisk was called as a witness, and in explanation of his answer stated, that, when the garnishee process was served, he had in his hands money to be paid Millison, upon school schedules, which was due him as a teacher in district No. 4, in the township. That he at the time did not know how much money he had to pay to Millison on his schedules until after the semi-annual meeting of the trustees of his township, in April, 1865, when they apportioned the township fund to different districts, and there then fell to district No. 4, the

sum of $104.50; that the schedules were brought to him by Millison, upon one of which there was an assignment of $112.50, indorsed by Millison to Calvin Vallaningham on the 15th day of February, 1865.

After hearing the evidence the court rendered a judgment discharging all of the defendants, and for costs against plaintiff. He thereupon entered a motion for a new trial which was overruled, and plaintiff to reverse the judgment brings the case to this court by appeal.

Messrs. J. B. WRIGHT and H. E. DUMMER, for the appellant.

1. The court erred in holding the alleged assignment valid, and rendering judgment in favor of the garnishees. In the absence of proof of the good faith of the assignment, and of a consideration passed, the alleged assignment should have been held invalid.

This question seems to have been fully met and disposed of in the case of *Born* v. *Staaden*, 24 Ill. 320, 322. In the case cited the garnishee by his answer disclosed the fact, that, before process was served upon him as garnishee, he had been served with what purported to be an assignment of the debt owed by the garnishee, the assignment having the formality of an acknowledgment before a justice of the peace. The court say: "We are not prepared to say that the *bona fide* assignment of a debt before the service of the garnishee process may not defeat it, but it must be shown to be a *bona fide* assignment upon a consideration passed."

The court in the same case anticipated the argument to be derived from the hardships imposed upon the garnishee under such circumstances, and indicate that the garnishee may protect himself by notice to the assignee to appear and establish the genuineness of the assignment. And the court say, that, if the assignee, on reasonable notice, neglected to appear and vindicate the *bona fides* of the assignment, it would be a good defense by the garnishee to an action in the name of the creditor for the use of the assignee.

2. The defendant, Fisk, should have been held as a garnishee, although a township school officer, and to that extent a public officer.

In Connecticut and Pennsylvania it has been held that no public officer should be subject to be held as a garnishee, because he is bound to transact the public business, and should not be subject to the inconveniences incident to the position of garnishee. This is decided in *Buckley* v. *Eckert*, 3 Penn. 368, and in *Stillman* v. *Isham*, 11 Conn. 124.

Mr. LYMAN LACEY, for the appellee.

The township treasurer, and other officers created by the school laws of this State, are not liable to be garnisheed for the wages of teachers, because:

1. The language of the statute does not, in express terms, include public corporations or the officers of public corporations; and trustees of schools are public corporations. *Trustees of Schools* v. *Tatman*, 13 Ill. 27. But simply says, that, after judgment rendered, execution returned, etc., "on the affidavit of the plaintiff, or other creditable person being made, that the defendants have no property within the knowledge of such affiant, in his or their possession liable to execution, and that such affiant hath just reason to believe that another *person* or *persons* is or are indebted," etc., "such *person* or *persons*," etc.

2. Because public corporations, officers of public corporations, sheriffs, municipal corporations, etc., are not specifically mentioned in the attachment act. Will the courts construe it to include them?

I think not, because the legislature, at the time they passed the act, knew the construction that the various State courts had put upon these attachment laws, such a construction as is opposed to that doctrine, on the grounds of public policy and the inconvenience that officers would be subjected to if that doctrine should prevail, and this I believe without exception. Drake on Attachments, ch. 21, §§ 460, 461, 462, 463, 493, 497, and the cases cited.

In the case of *Bulkly* v. *Eckert*, 3 Penn. St. 368, it was decided "that money held in official capacity by a treasurer of a board of school directors, in common with other money to be applied toward the payment of teachers, according to the rules and regulations of the acts of the legislature for the maintenance of public schools, and not as a private debt, due from him to defendant, cannot be attached," which is in exact point with the facts in the case at bar.

In the case of *Stillman* v. *Isham*, 2 Conn. 124, the court held, that "public officers having money in their hands, to which certain individuals are entitled, are not liable to the creditors of those individuals, in the process of foreign attachment." This is a strong case in point, elaborately discussed, and well supported by authorities. See cases there cited.

This court has decided that money in the hands of a sheriff, collected on execution, cannot be garnisheed. *Reddick* v. *Smith*, 3 Scam. 457; *Pierce* v. *Carleton*, 12 Ill. 364.

1. In the case of *Lightner* v. *Steinagel*, 33 Ill. 513, it was held that money received from redemption of the sale of land cannot be garnisheed. In that case the general doctrine is laid down by this court that "from the authorities we deduce the principle that whenever an official holds money merely as the agent of the law he cannot be subject to the process; but, if any thing arises to change this relation from an official obligation to a personal liability, then he would become amenable to this process."

2. Why the case of a treasurer of a school township can be distinguished from the principle of the cases cited, I am unable to see; he is a public officer, liable to be called to account by the trustees for settlement; liable to be annoyed by the garnishee process, and dragged around from place to place to answer and defend suits. They hold a public trust and are required by law to *pay the money over to a particular person.* He would not be personally liable to Millison for the amount of the schedule unless he had paid or done what was equivalent to paying the money to Millison and by agreement he had kept the money as the money of Millison and become discharged to

the trustees. This there is no pretense of, and there had not even been a demand by Millison and refusal to pay; he held the money in the same way and was indebted to Millison in the same way and no other, as a sheriff would be had he held the money collected on execution or from redemption.

3. In the case of *Hadley* v. *Peabody*, 13 Gray, 200, the question whether a public officer or corporation could be garnisheed or not was not raised at all, neither in the court below nor in the Superior Court, and was not noticed at all by the court.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This record presents the question whether money due a school teacher can be garnisheed in the hands of the district treasurer. The eighteenth section of the attachment act declares, that, when a garnishee shall be served and interrogatories filed, as provided by the act, he shall exhibit and file, under oath, an answer to such interrogatories. This section authorizes the plaintiff to interrogate him touching the lands, tenements, goods, chattels, moneys, credits and effects of the defendant, and the value thereof, in his possession, custody or charge, or from him or her due and owing to the defendant. The answer in this case states that the district owed Millison for teaching school, on two schedules, $131.25; and to pay the amount there was in his hands as treasurer $104, at the service of the writ.

As a general rule, money in the custody of the law, or in the hands of an officer of the law, is not liable to be reached by garnishee process. This court has held that money collected on execution by a sheriff is in the custody of the law, and is not liable to be garnisheed for a debt owing by plaintiff in execution. *Reddick* v. *Smith*, 3 Scam. 457; *Pierce* v. *Carleton*, 12 Ill. 364. It was again held, in the case of *Lightner* v. *Steinayel*, 33 Ill. 510, that money paid to the sheriff, and still in his hands, on the redemption of lands from a sale on execution, was not subject to the process of the garnishee act.

In the case of *Ross* v. *Allen*, 10 N. H. 96, it was held that the selectmen of a school-district cannot be held as garnishees for money due a school teacher. In the case of *Wendall* v. *Pierce*, 13 N. H. 502, it was held that money in the hands of a public officer, held in his official capacity to be paid to individuals, cannot be reached by garnishee process. In the case of *Deane* v. *McGavock*, 7 Humph. 132, the court held that money in the hands of the clerk of a court, held in his official capacity, was not subject to attachment or garnishee process. It was held in the case of *Curling* v. *Hyde*, 10 Miss. 374, that an administrator, having money in his hands as such, is not liable to be garnisheed. In other States, under express statutes however, such money may be reached in this mode. It was held in South Carolina, 1 Strobh. 239, that money in the hands of a United States marshal is not liable to attachment. It was held in the case of *Bulkley* v. *Eckert*, 3 Penn. St. 368, that money in the hands of a treasurer of a board of school directors, to be applied towards the payment of teachers under the requirements of the law, is not a debt due from the treasurer to the teacher. From these cases, and other authorities which might be cited, we may deduce the rule, that a person deriving his authority from the law to receive and hold money or property cannot be garnisheed for the same when held by him under such authority.

The reason is that the money or property is in the custody of the law. And while it so remains it is not the property of the debtor, to satisfy whose debt the process is instituted. Nor is such officer his debtor. And while the money is in the hands of the officer the law may control it, and prevent its ever reaching the hands of the person whose debt is thus sought to be satisfied.

In this case the money was in the hands of the township treasurer, when the garnishee process was served, and no portion of it had been distributed to the districts. It was still a common fund, and, until subsequently apportioned to the districts, the treasurer had no authority to pay a dollar of it on these schedules. Nor had it been specifically appropriated to

pay Millison, and until the trustees directed, by their order as such, that a portion of the fund should be paid on these schedules, the money was not in the hands of the treasurer for their payment. Up to the time the apportionment was made, the money was liable to be appropriated to other purposes. The treasurer could not pay money to any one, except upon the order of the trustees. Until he had the control of the funds, he was not liable to be garnisheed, if even then. He cannot be said to have owed, or have funds of Millison in his hands, when he, or any one else, could not know whether a dollar of the money he then held would be appropriated for the payment of these schedules; and it is clear, that he could not be garnisheed before the money was appropriated to be paid to Millison, whatever might be afterward held, if garnisheed, nor did the subsequent order of the trustees change his liability. The money was not in the hands or under the control of the directors, and hence there can be no pretense, that they were liable to be garnisheed.

The judgment of the court below is affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

THOMAS McKEE.

1. PLEADING — *variance between allegations and proofs.* Where, in an action against a railroad company for the killing of a horse, the declaration simply averred it to be the duty of the company to erect, maintain and keep in repair the fences on its roadway, and, that, by means of neglect in keeping them in repair, the horse had strayed upon the track and was killed, — *held*, that testimony showing that the horse strayed upon the track through a gate at a farm crossing, which had been left open, was inadmissible, as the declaration contained no averment, that the gate was not kept closed. A plaintiff can only prove what he alleges.

2. Neglect in maintaining and keeping in repair a fence, whereby a person is injured in his property, is a ground of action totally distinct from that of

carelessness in leaving open a gate on the line of the fence; and, when an action is predicated upon the latter ground, it must be so averred in the declaration.

3. SAME — *declaration must state material facts.* The declaration, in every case, must contain a full and explicit statement of all the material facts upon which a recovery is sought, that the defendant may be prepared to meet them.

4. INSTRUCTIONS — *upon matter inadmissible in evidence.* It is error for the court to instruct the jury upon matters inadmissible in evidence under the pleadings, but which, in fact, were admitted in proof.

5. RAILROAD COMPANIES — *liability for negligently leaving open gate — and when not liable.* A railroad company is not required to keep a patrol on the line of its road to see that the gates at farm crossings are kept closed; but, if its employees, seeing such a gate open, do not close it, when not opened by a person to whom an injury afterward results, the company is liable for such injury. If, however, the gate is opened by the person injured, and by his neglect left open, no action will lie for an injury resulting to him, by reason of such act and neglect.

APPEAL from the Circuit Court of Coles county; the Hon. A. L. DAVIS, Judge, presiding.

The opinion states the case.

Mr. O. B. FICKLIN and Mr. A. J. GALLAGHER, for the appellant.

Messrs. HENRY, READ & STEELE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case in the Coles Circuit Court, brought by Thomas McKee against The Illinois Central Railroad Company, for killing a horse, the property of the plaintiff, by the defendant's locomotive, the horse having got upon the track by means of a gate at a farm crossing being negligently left open, as alleged.

The court gave to the jury this instruction for the plaintiff:

"If the jury believe, from the evidence, that the horse of the plaintiff got upon the defendant's railroad at a gate erected at a farm crossing by the defendant, and that while so on said road was killed by the locomotive and train of the defendant,

and such gate through which said horse entered, at the time and for a long time previously thereto was left open continuously, or so large a portion of the time that the employees of the road whose duty it was to keep up and maintain the fence must have known the fact, that at the time the gate was not left open without the fault or negligence of the defendant, and that the place where said horse got upon said road was not within the limits of any city, town or village, nor at the crossing of any public highway, and was within five miles of a settlement and at a place where the proprietors of adjoining lands to the defendant's right of way had not fenced nor agreed to fence, and that said road had been open and the defendant had run upon it locomotives and trains more than six months previous to the killing of said horse, then the jury will find for the plaintiff and assess his damages at the value of said horse."

The defendant asked these instructions, which were refused:

"When the railroad makes and maintains a gate at a farm crossing for the accommodation of the owner of a farm, the duty devolves on the owner or proprietor of the farm, and not on the railroad company, to keep the gate closed, and if the death of the horse in controversy was occasioned by the negligence of such proprietor, the company is not liable.

"As there is no allegation in the declaration that defendant had failed or neglected to keep the gates closed at the farm crossing, near where the horse was killed, all evidence touching that question is excluded from the jury."

The only questions made here arise out of these instructions, and involve the point, whose duty is it to see that gates so placed at farm crossings are kept closed, and upon the admission of certain testimony.

There was no count in the declaration that this gate, at this farm crossing, was not kept closed,—the only averments are as to the duty of the company to erect, maintain and keep in repair the fences on their roadway, and that, by reason of neg-

lect in keeping them in repair, the horse strayed upon the track and was killed.

When proof was offered by the plaintiff that the gate was left open, the defendant objected, on the ground of the want of such an allegation in the declaration.

Was the testimony on this point properly admitted? We think not. The plaintiff in every case must state the facts in his declaration so plainly that the defendant may meet them. Neglect in maintaining and keeping in repair a fence, in general terms, is one ground of action,— that a gate on the line of the fence was carelessly left open is another. A fence, of which a gate is part, may be in perfect repair, and therefore the allegation that a gate was left open is necessary to give notice to the defendant of what he is to defend against. There being no allegation of negligence in this respect, the testimony should not have been received. And this is in accordance with the familiar principle that a plaintiff can only be permitted to prove what he alleges. The gravamen of the action was, neglecting to keep the fence in repair, and it is not maintained by proof that a gate was carelessly left open. Gates are made to be opened, and opening them, and carelessly leaving them so, is a good cause of action, entirely different from that of neglecting the duty of erecting and keeping in repair the fence, and of which a defendant should be apprised by the pleading. A fence is not out of repair, nor can it be so alleged, merely because the gate is carelessly left open. The plaintiff should have stated his case according to the facts he intended to prove. On this point we are with the appellants.

We would have no difficulty about the instructions, had the declaration been in proper shape. As it is, there being no allegation in the declaration embracing this matter, any instruction in relation to it was out of place. On the abstract question presented, it is as much the duty of the owner of the farm at the crossing to keep the gate closed as it is that of the company, for, as this court said in the case of the *Illinois Central R. R. Co.* v. *Dickerson*, 27 Ill. 55, it is not the duty of the company to keep a patrol the whole length of their road to see

that the fence is not broken down by breachy cattle, by men, or by a whirlwind, and by the same reasoning it would follow they are not obliged to patrol the line of their road to see if the gates at farm crossings are left open. Still they are liable, if their employees, seeing such a gate open, neglect to close it, and an injury results, unless the same be left open by the carelessness of the farmer. If the gate is left open by the owner of the land, the company would not be responsible, if by the company's agents it would be, and a neglect to shut it when it should be closed, by the agents or employees of the company, would be negligence for which the company would be liable.

The evidence, therefore, offered on this point, and admitted by the court, should have been rejected, there being no allegation in the declaration to which it was applicable.

The judgment of the Circuit Court is reversed, and the cause remanded with leave to plaintiff to amend his declaration.

Judgment reversed.

STEPHEN W. MILES *et al.*
v.
MARY J. WHEELER *et al.*

1. ADMINISTRATORS — *cannot purchase at their own sale.* The purchase of real estate belonging to the deceased by an administrator, through the interposition of a third party, at his own sale, is fraudulent *per se;* and it matters not that the sale was at public auction for a fair price, and made through the medium of a third party as the bidder, and to whom the administrator conveys.

2. The law forbids administrators, executors, and others sustaining a fiduciary and confidential relation, from dealing on their own account with the thing or person falling within that trust or relationship. It avails nothing to show that the intentions of the administrator were honest, and that there was no fraud in fact. The law shields him from all temptation by the inflexible rule that he cannot buy at his own sale.

3. The reason of the rule is, that the interests of the buyer and seller of the same property are necessarily antagonistic, and the only safe rule is one which absolutely forbids a trustee to occupy two positions inconsistent with each other.

Statement of the case.

4. LIMITATION — *how far applicable to trusts.* While statutes of limitation do not strictly apply to trusts, yet, in cases of constructive, as distinct from express trusts, courts of equity will sometimes adopt the analogies of the statute, and refuse relief after an unreasonable and unexplained lapse of time. But the courts have never sought to lay down a precise rule. Each case is to be adjudged in this regard upon its particular circumstances.

5. SAME — *where acquiescence is relied upon.* Where, in case of a trustee purchasing at his own sale, the defendant relies upon acquiescence, the burden is upon him of showing notice to the *cestui que trust*, distinct information to him, and acquiescence after that distinct information is communicated.

6. This rule is upon the ground, that, the purchase being *prima facie* a fraud and void, it devolves upon the person claiming under it to show whatever he relies upon as taking it out of the rule.

7. SAME — *the time from which acquiescence is to be computed.* Acquiescence is only to be computed from the period when the injured party acquired, or ought, in the ordinary course of affairs, to have acquired, a knowledge of the fraud.

8. STATEMENT OF ACCOUNT — *rents and profits, from what time allowed.* The general rule upon the question, as to the time from which rents and profits are allowed, is, that, where there has been great *laches* on the part of the complainant, and the defendant has not been guilty of positive fraud, the account will only be taken from the commencement of the suit; but where the complainants are infants, and there has been no *laches* in filing the bill, or the defendant is charged with fraud, the account will be carried back to the time when the fraudulent possession began. There is, however, no fixed rule upon this question. Each case depends upon its own circumstances.

WRIT OF ERROR to the Circuit Court of Monroe county; the Hon. SILAS L. BRYAN, Judge, presiding.

This was a suit in chancery, instituted in the court below by the defendants in error, the heirs at law of Amasa Wheeler, deceased, against the plaintiffs in error. The bill was filed for the purpose of setting aside a sale of land made by the administrator for the payment of debts, under an order of court; and an account of the rents and profits. Upon the hearing of the case in the Circuit Court a decree was rendered, setting aside the sale, requiring the defendants to make a deed, etc. The defendants to the bill brought the case to this court by writ of error.

The facts are sufficiently stated in the opinion.

Messrs. H. K. S. O'MELVENY and WM. R. MORRISON, for the plaintiffs in error.

Messrs. WM. H. UNDERWOOD and W. H. BARNUM, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, filed in April, 1861, by the heirs of Amasa Wheeler, for the purpose of setting aside a sale of land made by his administrator for the payment of debts, under an order of court. The facts material to the present case are as follows:

Amasa Wheeler, the father of the complainants below, defendants in error here, died in 1839, and Stephen W. Miles, senior, was appointed his administrator. In 1842 the latter obtained an order from the Circuit Court of Monroe county for the sale of the land of the deceased, and in August of the same year sold the premises now in controversy, and was himself the purchaser. In May, 1844, he obtained another order for the sale of the same land, and in July, 1844, professed to sell it to one Alexander, and so reported to the court. He made no deed to Alexander, however, until the 13th of September, 1845, when he conveyed to him, and on the same day Alexander reconveyed to Miles. Alexander never exercised any acts of ownership over the land, but, on the contrary, Miles took possession in 1840 or 1841, and kept possession up to the date of his own death in 1859, and always claimed it as his own. By his last will he devised the land to his son, Alonzo N. Miles, upon certain conditions, on his failure to perform which it was given to his elder son, Stephen W. Miles, junior, who in the mean while was to hold it as trustee for Alonzo. This bill is brought against them by the heirs of Wheeler to procure a reconveyance and an account of the rents and profits.

There is really no room for controversy as to the main question. It is perfectly manifest, from the facts stated above, that the name of Alexander was used merely as a means of passing the title of the land to Miles; that the sale to Alexander was

simply colorable; and that the transaction was really a purchase by an administrator at his own sale. This the law forbids. *Thorp* v. *McCullom et al.*, 1 Gilm. 614; *Dennis* v. *McCagg*, 32 Ill. 444; *Michaud* v. *Girard*, 4 How. 553. In this last case the Supreme Court of the United States gave this question a very searching examination, reviewing the authorities both in the common and civil law. In that case an executor, as in this an administrator, became the purchaser, through the interposition of a third person, of real estate belonging to the deceased, and sold at public sale. The court laid down the salutary rule that this is fraudulent *per se*, and that it matters not that the sale was at a public auction, for a fair price, and made through the medium of a third person as the bidder, and to whom the executor or administrator conveys. It avails nothing to show that the intentions of the trustee were honest, and that there was no fraud in fact. It is one of those cases in which the law will not permit a trustee to palter with his own conscience. It shields him from all temptation by the inflexible rule that he cannot buy. The plain and sufficient reason is that the interests of the buyer and seller of the same property are necessarily antagonistic, and the only safe rule is one which absolutely forbids a trustee to occupy two positions inconsistent with each other. A leading case in this country on this subject is *Davone* v. *Fanning*, 2 Johns. Ch. 252, in which the authorities are very fully considered by Chancellor KENT, and the rule is applied with great strictness.

It is however insisted by the counsel for plaintiffs in error that the right to relief in the present case is lost by lapse of time. While statutes of limitation do not strictly apply to trusts, yet in cases of constructive, as distinct from express, trusts, courts of equity will sometimes adopt the analogies of the statute and refuse relief after an unreasonable and unexplained lapse of time. But the courts have never sought to lay down a precise rule. Each case is to be adjudged in this regard upon its particular circumstances. In Hill on Trustees, 168, it is said: "But mere length of time will not, of itself, be a bar to relief on a constructive trust originating in fraud.

The party entitled to the benefit of such a trust must also be aware of his rights and acquiesce in being deprived of them; and time, in order to bar the remedy, will not begin to run until he acquires, or might have acquired, the knowledge of the fact on which the trust is founded." On the next page, the author adds: "It is difficult to lay down as a general proposition, what length of acquiescence will be a bar to relief on the ground of fraud. This must necessarily be a matter of equitable discretion, depending on the nature of the transaction and the circumstances of the parties in each individual case. The legal bar of twenty years appears to have been treated as the proper limit on several occasions; and it was distinctly decided in one case, that equity will not relieve where the facts constituting the fraud are in the knowledge of the party and he lies by for twenty-five years, and in another case twenty-one years' acquiescence was held to be a bar." On page 265, the author recurs to this subject, and quotes various cases showing that while in some instances relief has been refused after the expiration of eighteen years, on the ground of acquiescence, in others it has been allowed after the lapse of fifty years. On page 266, he says: "it is almost needless to add that a *cestui que trust* being an infant, or otherwise *non sui juris*, cannot be prejudiced by any acquiescence," referring to the case of *March* v. *Russell*, 3 M. & Craig, 31. It clearly cannot be claimed, that, where the injured party has been, during a portion of the time, an infant, this period is to be reckoned a part of the period of acquiescence.

In the case before us the administrator's sale took place in 1844. The age of the three children is not given in the record with accuracy, but the oldest must have been, at that time, about twelve, and the other two were still younger. They were taken to Pennsylvania while infants, by their uncle, and have since resided there. This bill was filed in 1861, at which time the youngest could not have been more than twenty-four or five years of age, and the oldest probably about thirty. There is no evidence in the record, showing when the knowledge of the fraud first came to them, and in view of their age,

sex, and distant locality, we cannot presume knowledge. In *Randall* v. *Irvington*, 10 Ves. 427, the court held, where in cases of this character the defendant relies upon acquiescence, the burden is upon him of "showing notice to the *cestui que trust*, distinct information to him, and acquiescence after that distinct information communicated." This is upon the ground, that the purchase being *prima facie* a fraud and void, it devolves upon the person claiming under it to show whatever he relies upon as taking it out of the rule. No proof of that kind has been made in the present case, and there is nothing upon which to found a presumption of acquiescence. The complainants were taken, while yet young girls, to a distant State, where they have since resided. They cannot be presumed to have known how their father's estate was settled many years before. To hold them barred by lapse of time, under such circumstances, would be to apply a far more rigid rule than is justified by any of the authorities cited by counsel, or which we have met in our examination of the case. Without deciding to which of our statutes of limitation, in reference to real estate, a court of equity should resort for analogies on the mere question of time, it is sufficient, in the present case, to say, that the time is only to be computed from the period when the injured party acquired, or ought, in the ordinary course of affairs, to have acquired a knowledge of the fraud. Then, only, does acquiescence begin. This is the language of all the cases, many of which are quoted in Hill on Trustees *ubi supra*, and also on page 527, in the notes. We have no evidence when this knowledge was acquired in this case, except by the filing of the bill. We cannot, therefore, hold the complainants barred.

By agreement, both parties have assigned errors as to the mode in which the account is stated. The court, by its master, took an account of rents and profits from the date of sale, and, after allowing the defendants for the money paid at the administrator's sale and interest, as also for taxes, repairs and an annual compensation of twenty-five dollars for taking charge of the farm, decreed the difference in favor of the complain-

ants, amounting to $1,600, to be paid by the estate of Miles. The appellants insist, the rents and profits should be allowed only from the commencement of the suit. There is no fixed rule upon this question. Each case depends upon its own circumstances, as in reference to what length of time shall bar relief. The general rule to be gathered from the cases is, that, where there has been great *laches* on the part of the complainant, and the defendant has not been guilty of positive fraud, the account will only be taken from the commencement of the suit. But where the complainants are infants and there has been no *laches* in bringing the bill, or the defendant is chargeable with fraud, the account will be carried back to the time when the fraudulent possession began. *Bowes* v. *East London Water Works*, 3 Mad. 375; *Drummond* v. *The Duke of St. Albans*, 5 Ves. 432; *Pettinard* v. *Prescott*, 7 id. 541; *Dormer* v. *Fortescue*, 3 Atk. 130. In the last cited case Lord HARDWICKE said: "so in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the court will decree an account from the time the infant's title accrued, for every person who enters on the estate of an infant, enters as a guardian or bailiff for the infant." In the case before us, the administrator, Miles, entered on the estate of the infants and continued in possession of the rents and profits until his death in 1859. Since then the defendants, his devisees, have been in possession, and as the bill was filed in 1861, it is very clear the account should be carried back to the administrator's purchase.

But the court erred in decreeing the payment of the entire sum of $1,600, by the estate of Stephen W. Miles. There are various persons interested as devisees or legatees in the estate, while only the defendants, Alonzo N. Miles and Stephen W. Miles, Jr., are interested in this land. Since the death in 1859, of the elder Stephen W. Miles, the rents and profits have been received by Stephen W. Miles, Jr., either in his own right or for the benefit of Alonzo N. Miles, and not for the estate. These rents and profits, which have accrued since the death of Miles, should, therefore, be charged against them, and

decreed to be refunded by them and not by the estate. In this respect there was error in the decree.

The defendants in error have assigned, as a cross error, that the court allowed defendants twenty-five dollars per annum compensation, for collecting rents, paying taxes and taking charge of the farm. The complainants would have been obliged to pay as large a sum as this for like services to any other person, and as Miles may have bought at the sale, without an actual intent to commit a fraud, and as the account, in other respects, is liberally stated for the complainants, and carried back for a long time, we are not inclined to direct this item to be stricken out. It is also objected, that the court allowed the defendants compound interest on the taxes, but, if so, the record does not show it.

The decree of the court below must be modified in the manner above indicated, and for this purpose the cause must be remanded. Inasmuch, however, as this modification does not go to the essential merits of the decree, and would probably have been made by the court below, if its attention had been called to the matter, we shall direct that each party pay his own costs in this court.

Remanded to modify decree.

Robert McKee
v.
Ruth Brown.

1. Recognizance—*lien on real estate.* A recognizance is not a lien on real estate, until there is a judgment of forfeiture and an award of execution on a *scire facias,* or until a judgment in debt is recovered on the recognizance.

2. Same—*sale before lien attaches.* A sale by the principal recognizor, before the lien of the judgment on a recognizance attaches, passes the title, and a sale under an execution upon such a judgment does not divest such title, nor does the purchaser under such a sale acquire any title as against the prior vendee who has recorded his deed before the lien of the judgment attached.

Statement of the case.

3. Dower—*barred by subsisting title.* Where a person was recognized to appear and answer to a criminal charge, and, he being joined by his wife, conveyed real estate in fee to his bail, or another, to secure his sureties, and fails to appear, and the recognizance is forfeited, and the holder of the title of such land, supposing a city to be entitled to the forfeiture, conveyed the premises to the city in satisfaction of the forfeiture; but, the forfeiture being afterward claimed by the school commissioner, and purchased in by both under the execution on the judgment recovered on the recognizance, and the deed was, under the order of court, made to the school commissioner, who conveyed it to another person, and where it appeared, that the person recognized to appear to answer the criminal charge had died; *Held,* in a proceeding instituted by his widow, against the purchaser from the school commissioner, for dower in the premises, that she was estopped by the conveyance of the property by her and her husband to indemnify his sureties, and, that defendant might set that and subsequent conveyances up as an outstanding title to defeat her recovery. That until that title is set aside as fraudulent, or otherwise, she had no claim to dower in the premises.

Writ of Error to the Circuit Court of Sangamon county; the Hon. Edward Y. Rice, Judge, presiding.

This was a petition, filed by Ruth Brown, for the assignment of dower, in two lots in the city of Springfield, in the Sangamon Circuit Court, against Robert McKee. It appears, that petitioner was the widow of Delos W. Brown, who was, in the autumn of 1853, recognized to appear at the next term of the Circuit Court to answer a charge of manslaughter. That in November, 1853, he and petitioner executed a deed conveying the lots to one James Rayburn, to hold the title subject to the order of Brown. After the execution of this deed, Brown left the State, and the recognizance was forfeited.

Subsequently, a controversy arose between the city of Springfield and the county of Sangamon, as to which was entitled to the property under the forfeiture. Rayburn wrote Brown, advising him to let the city have the property, when he directed its conveyance to the city, which was done by Rayburn conveying to Brown and he to the city. An action of debt was instituted on the recognizance, and a judgment recovered; execution was issued and the property purchased by both the city and county. The question was submitted to the Circuit Court, when an order was made, that the sheriff execute a deed

to the school commissioner of the county, which he did. He afterward sold the property for the benefit of the fund, and defendant became the purchaser and received the conveyance. No steps appear to have ever been taken to cancel the title held by the city, or to procure a conveyance of their title, to defendant.

The court below found, that the petitioner was entitled to dower in the premises, and it appearing that the property was not susceptible of a division, a jury were impaneled to ascertain the yearly value of the widow's dower in the premises. They returned a verdict, fixing it at sixty-four dollars per annum, and the court thereupon rendered a decree, that defendant pay that sum annually, during the life of petitioner. He thereupon prosecutes this writ of error, to reverse the decree.

Mr. James C. Conkling, for the plaintiff in error.

Mr. E. B. Herndon, for the defendant in error.

Mr. Chief Justice Walker delivered the opinion of the Court:

Two questions have been discussed in this case,—first, whether defendant in error has dower in the premises; and, secondly, if she has, whether the yearly value of the same has been fixed on a proper basis. We only deem it necessary to consider the second. It appears that Delos W. Brown, the husband of defendant in error, owned the premises in fee in his life-time, and, that she is his widow. It also appears that Brown, on the 6th day of October, 1853, was recognized by two justices of the peace of Sangamon county, to appear at the next November Term, to answer a charge of manslaughter; that immediately afterward he conveyed the premises to James Rayburn, defendant in error joining in the deed and relinquishing her dower, and he then left the county. This deed was recorded in the proper office in Sangamon county, on the 27th day of December, 1853. It appears that the recogni-

zance was afterward forfeited, but whether at the next or a subsequent term does not appear.

An action of debt was afterward brought on this forfeiture and a recovery had, execution was issued and the premises sold. They were bid in by the city of Springfield, and the school commissioner of the county, both claiming that they were entitled to the forfeiture. The premises not having been redeemed, the question was submitted to the Circuit Court, when it was ordered, that the sheriff convey to the school commissioner. The deed was accordingly executed, and he afterward sold the premises, and plaintiff in error became the purchaser.

It also appears, that Rayburn conveyed to Jacob Bunn, and he afterward conveyed to the city of Springfield. The evidence shows that Rayburn paid no consideration for the premises, and that, for the purpose of discharging the recognizance, Rayburn conveyed to Bunn for the city, and he received no consideration when he transferred his title to the city.

In the case of *Shattuck* v. *The People*, 4 Scam. 447, it was held, that, before the estate of the recognizor was bound by the recognizance, there must be, not only a failure to perform the condition, but an award of execution for the penalty, in a proceeding by *scire facias*, or a recovery of a judgment for the penalty in an action of debt; that the recognizance does not, by its own force, become a lien on the estate of the person entering into it, but the lien depends altogether upon the statute. And we are aware of no statutory provision which has declared that a recognizance shall become a lien on the property of the cognizor. It has, however, provided that judgments shall be a lien on the lands of defendants after the last day of the term. It would, then, seem that in this case the lien under the recognizance did not attach until the judgment was recovered on the recognizance; and, although the date of that recovery does not appear in this record, we conclude that it was not until after the deed to Rayburn was executed and recorded.

Then, if this conveyance to Rayburn is valid and binding,

of which we give no opinion, plaintiff in error did not acquire the legal title. It appears to be in the city of Springfield. And whether plaintiff in error has an equitable right to have this legal title conveyed to him, is not before the court. Nor is the question whether defendant in error has the right to have those conveyances set aside and canceled for fraud, properly before us for determination. Until the city of Springfield was made a party to a bill properly framed, these questions cannot be determined. So long as the conveyances through which the city claims remain uncanceled, the legal title is in the city. And, as defendant in error relinquished her dower by the deed to Rayburn, through which the title passed to the city, we can see no reason why she should be permitted to recover dower in the premises against plaintiff in error. So long as it subsists, he may set it up as an outstanding title in which defendant in error has relinquished her dower. Until that title is avoided by defendant in error for fraud or otherwise, she is estopped from claiming dower in the premises. The validity of the legal title vested in the city cannot be questioned in a proceeding in which that municipality is not a party. The decree of the court below must therefore be reversed and the cause remanded.

Decree reversed.

THE GOVERNOR, FOR THE USE OF WILLIAM THOMAS, Trustee, etc.,

v.

CLARK B. LAGOW *et al.*

1. SURETY—*extent of liability.* The general rule is, that the undertakings of a surety are not to be extended beyond the fair scope of the terms expressed, but are to be strictly interpreted.

2. So, where, by an act of the legislature, assignees were appointed to wind up the affairs of the Bank of Illinois, at Shawneetown, and were required to give bond, and allowed four years in which to discharge the duties assigned them under the act, and the time of final settlement was, by the legislature,

afterward extended two years, it was *held*, that this extension of the time without the assent of the sureties, operated as a discharge, and that the sureties could not be held liable for the acts of their principal after the expiration of the four years.

3. But, where, by the act appointing the assignees, it was made their duty to meet at the bank on a day named in each year, to cancel and burn all notes and certificates of indebtedness redeemed and canceled, and make report to the governor of the amount of assets remaining in their hands, and of the notes and certificates canceled; and where a decree in the United States Circuit Court required such assignees to account and pay over to a trustee appointed, the amount found to be due from them as assignees, and the assignees neglected and failed to perform any of said duties,—it was *held*, that the sureties of the assignees were liable for the amounts shown to have been by the assignees received and not paid over, during the four years. It was competent for the sureties to have discharged the liabilities and to have had recourse upon their principals.

4. PLEA—*when demurrable.* It is a well established rule of pleading, that if facts are alleged in a special plea which can be given in evidence under the general issue, such a plea is obnoxious to a special demurrer.

5. So, where the plea of *non est factum*, not sworn to, was interposed in an action of debt, being the general issue, it put in issue every fact in relation to the execution of the bond, except the fact of the signature of the pleader, and therefore the facts that other signatures either as sureties or witnesses, were wrongfully placed on the bond, after that of the pleader, could properly be given in evidence under such a plea; and hence, a special plea alleging these facts is bad on special demurrer.

APPEAL from the Circuit Court of Edgar county; the Hon. JAMES STEELE, Judge, presiding.

The opinion of the court contains a full statement of the case.

Messrs. WILLIAM THOMAS and WILLIAM H. HERNDON, for the appellants.

Messrs. ALLEN & SCHOLFIELD, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of debt, originally brought in the Crawford Circuit Court, and by change of venue taken to Edgar county, on a bond executed by Ebenezer Z. Ryan as principal, and Wilson Lagow, deceased, security, to the governor of the

State, in the penalty of fifty thousand dollars, and dated March 27, 1845.

The condition of the bond recites that Ryan, by an act of the legislature, entitled "an act supplemental to an act to reduce the public debt one million of dollars, and to put the Bank of Illinois into liquidation," had been appointed one of the assignees to close the business of that bank. Now, if the said Ryan, as assignee, as aforesaid, shall faithfully discharge the duties enjoined on him by the provisions of said act, then the obligation was to be void, otherwise to remain in full force and virtue.

The action is against Clark B. Lagow, and David H. Lagow, the first named the executor, and both the devisees of Wilson Lagow, deceased, under his last will and testament.

The breaches assigned in the declaration are, that Ryan has not faithfully discharged the duties enjoined on him as assignee, according to the provisions of the act of the legislature, under which he was appointed, but has wholly failed therein in these particulars: first, that at the December Term, 1850, of the Circuit Court of the United States for the district of Illinois, that court made and entered a decree in a cause therein pending between the Bank of the State of Illinois, as complainant, and Albert G. Caldwell, said Ebenezer Z. Ryan, David A. Smith, and George A. Dunlap, assignees of the Bank of Illinois, as defendants, appointing William Thomas, for whose use this suit is brought, trustee of the Bank of Illinois, in place of the assignees appointed by the act of the legislature; and that at the December Term, 1859, of said court a decree was entered, requiring Ryan to pay over to Thomas as such trustee, the sum of $45,467.29, the amount found due from him as such assignee to the trust fund, of which Ryan had notice, but which he has not paid over but has wholly failed and refused.

Second, that during the years 1845, '46, '47 and '48, Ryan collected and received of the bank, bills and certificates of the bank $50,000, to wit: In 1845, $16,000; in 1846, $14,600; in 1847, $15,000, and in 1848, $4,400; that it was the duty of Ryan, on the first Monday in December, in each of those

years to have met the other assignees of the bank at Shawneetown for the purpose of canceling and burning all notes and certificates, redeemed, and of making a full report to the governor of the amount of assets in his hands, and of the notes and certificates redeemed and canceled, and it was also the duty of said Ryan to faithfully account for and pay over to the trustees all the moneys and evidences of indebtedness which came to his hands as such assignee, of which he received the sums aforesaid; yet, Ryan did not, on the first Monday of December, of each of the years aforesaid, meet the other assignees of the bank at Shawneetown, and burn and cancel all notes and certificates received by him, and make full report to the governor of the amount of assets in his hands, and of the notes and certificates canceled; nor has the said Ryan paid over to the trustee all the moneys and evidences of indebtedness which came to his hands. Third, that at the June Term, 1851, of the Circuit Court of the United States for the district of Illinois, William Thomas was appointed trustee of the bank, to execute the trusts created by and existing under the acts of the general assembly, authorizing the appointment and prescribing the duties of said assignees, and requiring the said assignees severally to pay over to said trustee all moneys collected by them, and to deliver to said trustee all the bills and certificates of said bank in their hands. And, at the December Term, 1859, of said court, a decree was entered, requiring Ryan to pay to the trustee $45,467.29, the amount found to be due from Ryan as such assignee on account of assets which had come to his hands. Fourth, it was the duty of Ryan, on the first Monday of December of each year after his appointment, to meet with the other assignees at Shawneetown for the purpose of canceling and burning all notes and certificates redeemed and canceled, and making a full report to the governor of the amount of assets in his hands, and of the notes and certificates canceled; yet he failed to meet with the other assignees at Shawneetown on the first Monday in December in each year, or any year, after his appointment for the purposes aforesaid; nor did he at any time make a full

report to the governor of the amount of assets in his hands, and of the notes and certificates canceled, as was his duty to have done. Fifth, that, during the time of the action of Ryan as assignee, he collected and received, as such assignee, $40,000 of the notes of the bank, and $45,000 of the certificates of the bank, which it was his duty to have canceled and destroyed, and to have reported the same to the Governor; yet, he did not cancel and destroy the notes and certificates so received, but converted the same to his own use. The sixth breach sets out the proceeding in the United States Court, the appointment of a trustee, and the decree requiring the assignee to account, and then avers, that a further decree was entered, requiring Ryan to pay over to the trustee the amount found to be due from him as such assignee.

It is then averred, that Ryan had not paid to the trustee the amount found to be due as aforesaid, and that, by reason thereof the defendants became liable to pay the $50,000, and, that they had not paid the same, etc.

The defendant appeared and filed twelve pleas, which follow:

1. *Non est factum* not sworn to.

2. *Nil debet.*

3. That the bond was signed by all the obligors except James Nabb, and delivered to Ryan to be delivered to the Governor; that Ryan procured the signature of Nabb to the bond without the knowledge or consent of the other obligors, thereby materially altering the bond, and, therefore, the bond is not the act and deed of the obligors.

The fourth plea is the same in substance as the third plea.

5. That by the law Ryan was bound to wind up the bank in four years, and that the creditors and stockholders of the bank obtained an act of the legislature extending the time, without the knowledge or consent of the securities, and thereby released them from liability.

6. That Ryan was bound by the law to wind up the affairs of the bank in four years, and Ryan procured an act of the legislature extending the time, without the knowledge or consent of the securities, and that they are thereby released, etc.

7. The same in substance as fifth and sixth.

8. That while the suit was pending in the United States Court, as stated in the declaration, the bill was amended, making the securities of Ryan parties, that Jesse K. Dubois, one of the securities, bargained with William B. Warren, agent for the plaintiff, that in consideration of advancing a *pro rata* part of the liability of said Ryan, he should not be proceeded against any further, and, therefore, all the obligations are released.

9. After the bond was signed it was materially altered in this: That Ryan procured Hull and Thorn to subscribe their names thereto as witnesses, without the knowledge or consent of the obligors, whereby the bond became and was void.

10. That Ryan entered into a written contract with James Dunlap and William B. Warren, whereby Ryan agreed to indorse upon an account, stated by Warren as mentioned by plaintiff in the fourth assignment of breaches of condition of the bond, an admission of the correctness of said account, and also authorize the confession of judgment in favor of the trustee of the bank, for the sum stated by Warren, they, said Dunlap and Warren, agreed that neither Ryan nor his securities ever should be sued on said bond, which agreement was indorsed and approved by said Thomas, trustee, etc., that Ryan, accordingly, indorsed the account and authorized judgment, whereby the obligors were released, etc.

11. That by an agreement in writing with James Dunlap and William B. Warren, Ryan agreed to, and did, indorse upon an account, stated by said Warren as special master, an admission of the correctness of said account, and agreed that judgment should be entered against him for the amount appearing to be due by said account, and also agreed to surrender to said trustee certain property in Lawrenceville, of which he was in possession; the said Dunlap and Warren agreed that no suit should ever be brought against said Ryan or his securities afore said, that said Ryan did so indorse on the account aforesaid, and did deliver to said Thomas the property aforesaid, whereby

the obligors aforesaid became and were released from all liability on said bond.

The twelfth is a plea of the statute of limitations, that the causes of action did not accrue within sixteen years before the commencement of suit, on which issue was taken.

A demurrer was sustained to the third, fourth, and ninth pleas, and overruled as to the sixth, seventh, eighth, tenth and eleventh. Issues of fact were made up on the first, second and twelfth pleas.

The plaintiff abided by his demurrer, whereupon the court gave judgment in bar of the action.

To reverse this judgment the record is brought here by appeal, and the only error assigned is this decision on the demurrers.

By agreement, the appellees have assigned cross errors.

The principal point made on the record is the one raised by the fifth and sixth pleas.

A reference to the act of 1845, under which the Bank of Illinois was put in liquidation, and Ryan appointed assignee, shows, by section 17, that the assignees had four years from the passage of the act in which to make a final settlement of the affairs of the bank, and the debtors of the bank were allowed the same time in which to pay their debts to the bank, by paying them in four equal annual installments with six per cent interest, with good and approved security.

The eighth section required the assignees to meet at Shawneetown, on the first Monday of December of each year, for the purpose of burning and canceling notes and certificates of the bank, and to make reports to the governor, and required three assignees to constitute a quorum for the purpose. Section 15 authorized the assignees to make such compromises and settlements as they might deem most advantageous to the bank; and by the act the assignees were clothed with full power, and were required to collect all the debts due the bank, pay all its liabilities, and finally close up its affairs, and, as we have seen, four years were allowed within which to perform these duties.

All the real estate of the bank was assigned to the assignees jointly, and the personal estate, rights, and credits, and debts of every kind due the bank at Shawneetown, and its branch at Lawrenceville, were assigned to Caldwell and Ryan. Bond to the governor was required in the sum of $50,000 for each assignee, conditioned for the faithful discharge of the duties of such assignee, and faithfully to account for, and pay over all the moneys and evidence of indebtedness, which should come to the hands of each assignee under the provisions of the act.

In 1849, on the 10th of February, the act was passed extending the time to the assignees for liquidating the affairs of the bank, until the 1st day of January, 1851, the second section of which authorized the assignees to sue for and recover debts due the bank in their own names, and the third section provided for maintaining pending suits in their names.

The question is presented by the fifth and sixth pleas, how were the rights of these sureties affected by this extension of time?

By the act of 1845, under which the bond in suit was executed, the sureties who executed it incurred a liability to endure four years and no longer. Within that time all the affairs of the bank were to be closed up, and for this they undertook, and they can be held liable for no more than Ryan was required to do by that act.

All the cases show that the undertaking of a surety is to receive a strict interpretation and is not to be extended beyond the fair scope of its terms. To the extent, and in the manner and under the circumstances, pointed out in his obligation, he is bound, and no further. *Miller* v. *Stewart*, 7 Wheat. 703.

This court held, in the case of *Davis et al.* v. *The People*, 1 Gilm. 409, that, where an act of the legislature gave a collector of taxes longer time in which to make payment than he had by the law in existence when he executed his official bond with sureties, the sureties were fully discharged if the act was passed without their assent.

That the act of 1849, was passed without the assent of the

defendants is averred in the plea and admitted by the demurrer.

In that case, the court say the legislature had the undoubted right to pass the act, and it was binding on the State, and, while it was operative, no suit could have been prosecuted against the collector, and, during that period, the sureties had no right to make payment to the county and resort to their principal for re-imbursement. A surety is not permitted to discharge the debt of his principal until he is in default and can be legally called on for payment. The act in question materially changed the original contract to which the sureties were parties, and, if passed without their assent, fully discharged them from all liability on the bond.

The same was held in the case of *The People* v. *McHatton et al.*, 2 Gilm. 638, which was a suit on the official bond of the sheriff, who had procured an extension of time to pay over his collections, without the consent of the sureties. The same doctrine was held in *Waters et al.* v. *Simpson et al.*, id. 570.

It is a familiar principle that the contract of a surety is to be construed strictly, and he is not to be held responsible beyond the precise terms of his undertaking. His risk is not to be increased, or his responsibility extended, without his assent. Ib. 574.

Here the sureties undertook that Ryan would perform his duties faithfully for four years, but not for six years, to which the time was extended for him to settle up the affairs of the bank.

But there is a breach assigned in the declaration which does not seem, in the opinion of a majority of the court, to be affected by the act of 1849, as it is alleged to have occurred previous to that time, and for which these sureties were responsible.

It is alleged in the second breach, that, during the years 1845, 1846, 1847 and 1848, Ryan received of the bank in bills and certificates $50,000 (specifying the amount received in each year), and that he did not meet the other assignees on the first Monday of December of each year, and burn and cancel them, and make report to the governor of the amount of assets in his

hands, and of the notes and certificates redeemed and canceled, and that he had not paid over to the trustee all the moneys and evidences of indebtedness which came to his hands as assignee, being the sum aforementioned.

For this breach a majority of the court hold that a suit might have been maintained upon the bond at any time, notwithstanding the extension of time, after Ryan failed and neglected to burn and cancel the notes and certificates in his hands. The liability had attached to the sureties for this breach, and was not enlarged by the act of 1849. They could have paid off the liability and had recourse upon Ryan for re-imbursement.

For breaches occurring after the passage of that act, we are all of opinion the sureties are not liable.

These considerations dispose of the principal points raised in the case.

As to the cross errors, which call in question the decision of the court sustaining plaintiff's special demurrer to the third, fourth and ninth pleas, it is only necessary to say that the general issue, *non est factum*, had been pleaded, and, though not sworn to, it put in issue every fact in relation to the execution of the bond, except the fact of the signature of the defendants, which could only be denied by such a plea sworn to.

By well established rules of pleading, if facts are alleged in a special plea, which can be given in evidence under the general issue, such plea is obnoxious to a special demurrer. As to the third and fourth pleas, if the signature of James Noble was wrongfully placed to the bond after its execution by the defendant's ancestor, it was not his bond, and that fact was met by the plea of *non est factum*. *Longley* v. *Norval*, 1 Scam. 389.

The ninth plea alleged, that the bond, after being signed by the obligors, was materially altered in this: that Ryan procured Hall and Thorn to subscribe their names thereto as witnesses, without the knowledge or consent of the obligors, whereby the bond became and was void. All this could be given in evi dence under the general issue if it amounted to a defense, and therefore this plea was obnoxious to a special demurrer. But the plea itself fails to show under what circumstances they

subscribed their names as witnesses, and to whose signatures. It might be, that these witnesses were present at the execution of the bond, and attested it thereafter. If so, there could be nothing improper in this. It was no alteration of the bond, nor did it affect in any way the liability of the sureties.

It is contended by appellant, that the appointment of Ryan was without limit as to time, and that, upon his acceptance and entering on the duties, he would continue to be assignee, until the final settlement of the affairs of the bank, but the act itself provided this settlement should he fully completed in four years, and if completed his functions ceased. The trustees undertook for that period of time and no longer.

Again, it is said by appellant, that this is not a case in which the State alone is interested; that the bond was executed as a security to all parties interested as creditors of the bank, and, if the State alone was the party, still the act of 1849 would not operate as a release; and reference is made to the case of *The People* v. *Leet*, 13 Ill. 268, in which the cases of *The Governor* v. *Ridgeway*, 12 id. 15, and *Compher* v. *The People*, id. 294, are cited in the opinion. The substance of these cases is, that the sureties of an officer upon his official bond, conditioned for the faithful discharge of the duties of the office, are liable for the performance of all duties imposed upon him, which are within the scope of his office, whether such duties are imposed by laws passed before or after the execution of the obligation. Parties who go security on bonds of this character, do so with the full knowledge and expectation that the revenue laws will be changed, and the duties of collectors altered as the public interest may require, and they have no right to complain of any alteration in the laws, not materially changing the character of the duties of their principal, especially when such alterations are in no wise prejudicial to their interests.

We do not perceive the similitude of the cases. This case is governed by the principles announced in *Davis* v. *The People*, *The People* v. *McHatton* and *Waters* v. *Simpson et al.*, before referred to.

The act of 1849 enlarged the responsibility of the sureties

two years beyond the time for which they had undertaken for Ryan's fidelity. It is in vain to say such extension was not prejudicial to their interests, compelling them to answer for delinquencies which occurred after the four years had expired.

It is urged by appellant, upon the question made by the pleas averring arrangements made by Ryan and Dubois with the trustee operating as a release of the obligors, that if the statements contained in those pleas were true, the trustee had no right to make them nor any other to the prejudice of the trust fund, and reference is made to the cases of *Thomas* v. *Sloo*, 15 Ill. 70, and *Same* v. *Bowman and Harrow*, 29 id. 426.

By the act of 1845, authority was conferred upon the assignees to make such compromises and settlements as they might deem most advantageous to the bank. The demurrer to those pleas (tenth and eleventh) admits the fact, that the compromises were made, but we are not of opinion this power extended so far as to release the sureties of the assignee. Compromises and settlements of indebtedness in the usual way, and according to the common usage in such cases, was the extent of the power conferred, and should be confined to that extent. The whole purpose of the act would be defeated by giving it a construction so broad as is set up. It could not have been the intention of the legislature thus to defeat one of the principal objects of the act, and that was to secure the creditors in the faithful collection and application of the assets of the bank. This is the reason such heavy security was required of each assignee.

Upon the point made by appellees, that the signature of James Nabb was obtained to the bond after their testator had signed it, we are of opinion it did not avoid the bond if done before its delivery to the governor. Before its delivery, Ryan could have procured as many names as he chose to his bond. *Gardner* v. *Walsh*, 85 English Com. Law, 82; *Foy* v. *Blackstone*, 31 Ill. 538; *Hurst* v. *Weir*, 29 id. 85.

We have now examined and disposed of the principal points raised on this record, and, for the reasons given, the judgment of the Circuit Court must be reversed and the cause remanded,

with leave to both parties to amend their pleadings, should they desire so to do, and for further proceedings consistent with this opinion.

Judgment reversed.

PRENTICE J. DOUGLASS
v.
ALEXANDER X. PARKER and GEORGE M. PLUMBE.

1. MOTION—*must be preserved by bill of exceptions.* Where the ruling of the court upon a motion to dismiss for want of a proper bond for costs is assigned for error, such a motion only becomes a part of the record and is properly brought before this court by means of a bill of exceptions.

2. EVIDENCE—*questions of.* The same rule applies where the errors assigned relate to questions of evidence.

WRIT OF ERROR to the Circuit Court of Coles county; the Hon. JAMES STEELE, Judge, presiding.

This was an action of assumpsit, brought by Parker and Plumbe, in the Coles County Circuit Court, against Douglass, wherein, upon trial by the court at the October Term, 1866, the issue was found for the plaintiffs.

It would appear, that the plaintiffs, Parker and Plumbe, were non-residents, and that their attorney on the day suit was brought, filed a bond for costs in the following form:

"I hereby enter myself security for costs in the above entitled cause, and acknowledge myself bound to pay the same either to the officers of court or the opposite party, according to the statute in such case made and provided. Witness my hand and seal this October 1st, 1866.

"D. T. MCINTYRE."

Upon which the following indorsement was made:

"Filed, October 1st, 1866.

"H. C. WORTHAM, *Clerk.*"

On the first day of the term, defendant's counsel moved to dismiss the cause for want of a bond for costs, whereupon the plaintiffs' attorneys entered a cross motion for leave to file a new bond. The court overruled the motion to dismiss, and sustained the cross motion. The defendant assigns for error the action of the court in overruling the motion to dismiss, in granting plaintiffs leave to file a new bond, and in admitting the note in evidence under the common counts.

Mr. W. B. PORTER, for the plaintiff in error.

Mr. D. T. MCINTYRE, for the defendants in error.

Per CURIAM: The errors assigned upon this record relate to the alleged ruling of the court upon a motion to dismiss for want of proper bond for costs, and upon questions of evidence. There is however no bill of exceptions in the record, and these questions are therefore not before us. As we have often said, motions of this character only become a part of the record by means of a bill of exceptions.

Judgment affirmed.

WILLIAM BROWNFIELD *et al.*

v.

THOMAS BROWNFIELD *et al.*

1. EVIDENCE — *as to the validity of a will.* Where the questions at issue were the manner of the execution of a will, and the influences which led to it, it appears that the exclusion of evidence showing the employment of fraud or undue influence would be error.

2. But in such a case it was not error to exclude evidence showing only that the testator, in his ordinary affairs, acted under the advice of the devisee, and was even influenced by that advice, since that alone would not tend to prove that he used undue influence in procuring the execution of the will.

3. *Mental capacity.* Nor is it error, in such a case, to admit oral evidence in reference to testator's not holding an equitable title to lands which he was devising. On the question of mental capacity it tended to show that his memory was good, that his sense of justice was unimpaired, that his judgment as

to the best means of preventing subsequent litigation with those holding the equitable title was sound.

4. WILL—*presumptions in favor of.* The law presumes that a will properly executed and attested, is valid, until the presumption is overcome by clear and satisfactory proof. And where the testator was shown to be a man of more than ordinary degree of force of character, and there was no diminution of capacity up to the time of his making the will, and no improper act by the devisee was shown, a finding by the jury in favor of the validity of the will was not disturbed.

5. WILL—*execution and acknowledgement of.* All that the statute requires in the execution of a will, is, that the testator shall either sign the will in the presence of the witness, or acknowledge his signature to him; and, therefore, in a contest as to the validity of an alleged will, the testimony of one of the subscribing witnesses, that the testator either signed the will in his presence, or acknowledged his signature to him, but he could not remember which, was properly allowed to go to the jury.

6. FINAL HEARING—*may be dispensed with.* It is not error for the chancellor to refuse to go through the form of a hearing, upon a bill to contest the validity of a will, where the verdict was supported by the evidence, simply to deny the relief which the jury had found the complainants were not entitled to receive.

7. ARGUMENT—*privileges of counsel.* While this court can perceive no valid reason for prohibiting counsel from arguing the case of a contested will in his own way before the jury, so long as he confines himself to the evidence and the legal principles involved, and is respectful and decorous, still, it does not appear that to refuse to permit the counsel to show the will to the jury on the argument, was an error for which the decree should be reversed.

8. INSTRUCTIONS—*when properly refused.* It is not error to refuse instructions which are not based on the evidence, though they may present correct abstract legal propositions; or, to refuse instructions where the principles which they announce are embodied in those that are given.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. OLIVER L. DAVIS, Judge, presiding.

John Brownfield, a citizen of Champaign county, Illinois, died on the 6th day of July, 1863, leaving three hundred and seventy acres of real estate, valued at about sixteen thousand dollars, and about three thousand dollars in personalty; and leaving, also, what purported to be his will, whereby all his personal property and about two-thirds of his real estate was given to his youngest son, Thomas Brownfield; leaving, also,

ten children, or their descendants (who are the plaintiffs in error), besides the principal devisee, aforesaid. The will was admitted to probate in Champaign county, and the plaintiffs in error, on the 12th day of November, A. D. 1863, filed their bill in chancery, under the statute, to contest the validity of the will. The bill charges that the execution of the will was obtained by fraud and undue influence on the part of Thomas Brownfield, and that he fraudulently prevented the revocation of the will in the life-time of the testator. Issue was joined and the case submitted to a jury. At the first trial they failed to agree, and at the second trial found in favor of the validity of the will, and the court, upon the final hearing, dismissed the the bill. The complainants below sued out this writ of error, and allege that the decree should be reversed.

Messrs. WOOD & LONG, for the plaintiffs in error.

1 The court improperly excluded from the jury evidence which tended to show the previous general conduct of the devisee toward the testator. *McDaniel* v. *Crosby*, 19 Ark. 533; *Davis* v. *Calvert*, 5 Gill & J. 269.

2. The witness would not swear that the testator signed the will in his presence, nor would he swear that he acknowledged it in his presence. If he will not swear to either requirement of the law, how can it be that his testimony establishes one of them? *Boldry* v. *Parris*, 2 Cush. 433; *Butler* v. *Benson*, 1 Barb. (N. Y.) 527.

3. Upon the question of alterations and additions to the will, the counsel clearly had the right to show the will to the jury on the argument. *Schwarz* v. *Herrenkind*, 26 Ill. 208; *Burr* v. *Williams*, 20 Ark. 188.

4. The court erred in excluding testimony that the testator asked for the will to destroy it, and that the devisee promised to destroy it; this promise was binding on the conscience of Thomas, and equity will compel him to perform it. *Podmore* v. *Gunning*, 7 Simons, 644 (10 Eng. Ch. R. 241), *Sellack* v. *Harris*, 5 Viner Abr. 521; *Dakeford* v. *Wilks*, 3 Atk. 539; *Barrow* v. *Greenough*, 3 Ves. Ch. 152.

5. The doctrine in equity is, that what is obtained by fraud shall be returned; or if held by a legal title, it shall be held in trust for those to whom it rightfully belongs. *Allen* v. *McPherson*, 1 H. of Lords Cases, 222; *Marriot* v. *Marriot*, 1 Str. 673; *Allen* v. *McPherson*, 5 Beav. Ch. 483, and cases there cited; id. 19 Eng. Ch. (1 Phillips) 132; *Rigg* v. *Wilton*, 13 Ill. 15; *Card* v. *Grinman*, 5 Conn. 164; *Blanchard* v. *Blanchard*, 32 Verm. 62; 1 Redf. on Wills, 319, § 32; *Gaines* v. *Gaines*, 2 A. K. Marshall (Ky.) 190. These cases fully establish the rule, that where a testator is prevented by fraud from destroying or revoking a will, the devisee is a mere trustee for the heirs.

Mr. W. D. SOMERS, for the defendants in error.

1. Undue influences, in no way connected with the testamentary act, are not evidence to impeach the will. *Eckart* v. *Flowry*, 43 Penn. 46; *Small* v. *Small*, 4 Greenl. 220; *McMahan* v. *Ryan*, 8 Harris, 329; *Blakeley* v. *Blakeley*, 33 Ala. 611; *O'Neal* v. *Farr*, 1 Richardson, 80, 84; *Martin* v. *Teage*, 2 Speer, 268; *Miller* v. *Miller*, 3 Serg. & Rawle, 267; 1 Redf. on Wills, 524, § 2; 22 Wend. 526; 1 Williams on Ex. 44, and notes; 1 Green's Ch. 82; 2 Strobh. 44, 552; *Davis* v. *Colvert*, 5 Gill & J. 269, 301.

2. The presumptions of law are all in favor of the will. *Wilson* v. *Moran*, 3 Brad. Sur. 172; *Allen* v. *Pub. Adm.*, 1 Brad. Sur. 378; *Taylor* v. *Kelley*, 31 Ala. 59; *Davis* v. *Davis*, 3 Am. Law Reg. 533.

3. The law does not require, that a will shall be established on the concurring testimony of two of the subscribing witnesses. *Rigg et al.* v. *Wilton et al.*, 13 Ill. 15; *Nocks* v. *Nocks*, 10 Gratt. 113; *Sawyer* v. *Smith*, 8 Mich. 44; *Montgomery* v. *Perkins*, 2 Metc. 447; 3 Barb. Ch. 158; *Henry* v. *Thompson*, 6 Cow. 178; 2 A. K. Marsh. (Ky.) 229; *Roberts* v. *Phillips*, 4 Ad. & Ellis, 450.

4. The declarations of the testator were properly admitted as showing, that he possessed memory and mental capacity sufficient to fully understand the nature and character of his acts. *Converse* v. *Wales*, 4 Allen, 512; 1 Redf. on Wills, 551, § 1;

Waterman v. *Whitney*, 1 Kern. 157; *Dennison's appeal*, 29 Conn. 399.

5. The many offices held by the testator are evidence of his mental capacity, and it is not shown to be diminished. 26 Wend. 254; 3 Davies, 37; 17 Barb. (N. Y.) 246; 2 Comst. 498; 6 Harr. Dig. 1666; 18 Pick. 115; 3 Stark. Ev. 1708; 7 Pick. 99; 2 Greenl. Ev. 689.

6. The evidence of the attesting witnesses is conclusive as to the fact of the execution of a will. 2 Greenl. Ev. 677; 1 Jarm. on Wills, 118; Phil. on Ev. Am. Notes, 449; *Withington* v. *Withington*, 7 Mo. 589; *Murphy* v. *Murphy*, 24 id. 526.

7. The decree of the chancellor must be in accordance with the verdict of the jury, and a final hearing by him is therefore an unnecessary formality. *Rigg et al.* v. *Wilton et al.*, 13 Ill. 19; *Runkle* v. *Gates*, 11 Ind. 97; *Doe dem. Reed* v. *Harris* (Hil. T.) 6 Adolph & Ellis, 214; 3 Wood. Vin. Lect. 477; 2 Sto. Eq. §§ 816, 820; 1 Smith's Ch. 3; 2 Fonbl. Eq. 817; *Tarver* v. *Tarver*, 9 Pet. 180; *Gains* v. *Chew*, 2 How. (U. S.) 619, 645.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

On the 12th day of November, 1863, William Brownfield and a number of others, the heirs of John Brownfield, filed their bill in chancery, in the Champaign Circuit Court, against Thomas and Milton Brownfield, to impeach the last will of John Brownfield, deceased. The bill alleges that the will was obtained by fraud, and undue influence exercised by the defendants over the testator in the execution of the will. That, by its terms, Thomas is made the legatee of all the personal estate, and devisee of a large portion of the real estate, of which testator died seized. That testator was incompetent, at the time, to make a will, and that Thomas, who was a son, obtained its execution by fraud and undue influence. That testator, in his last illness, and while he was helpless, attempted to gain possession of the will for the purpose of destroying it, but was prevented by Thomas, who had taken possession of the keys of the

desk in which the will was deposited, and would not permit other persons to obtain and give the will to testator, that he might destroy it as he desired.

That he requested Thomas to burn it, which he promised to do, but never did. That he repeatedly made similar requests, and Thomas uniformly promised to do so, but failed to comply, and that testator died in the belief that the will had been destroyed.

Thomas Brownfield answered, admitting the death of testatator as alleged; that he made a last will, but denies all fraud or undue influence, and insists that it was executed in due form, and that it is legal and binding, and that he took the title to the property according to the terms of the will. Denies that testator was influenced by any one in making the will, or that he was present when it was made. Asserts that the will was intrusted to him by testator in his life-time, and before his sickness, and that he and testator kept their valuable papers locked, in the same desk in which the will was deposited; admits that he kept the desk locked during testator's last illness, but denies that he refused to let testator have the key. Denies that the will was ever revoked, or that it could, under the law, be done by words spoken. Denies that testator desired to revoke the will, and alleges that he was deranged a portion of the time during his last illness, and that for many days before his death, testator was incapable of revoking the will, and that what he said was not with that intention.

Replications were filed and a trial subsequently had on an issue in fact submitted to a jury, who found the issues for defendant. Complainants entered a motion for a new trial, which was overruled by the court, and a decree pronounced, dismissing the bill. To reverse that decree this writ of error is prosecuted, and errors are assigned on the record.

It is insisted, that the court below erred in excluding portions of the deposition of Mary T. Brownfield. An examination of the excluded portion of her testimony shows, that it was in no wise connected with the execution of the will. The manner of its execution, and the influence which led to it, was

the question at issue. Had there been evidence showing the employment of fraud or of undue influence, directly connected with its execution, then this evidence might have been proper to explain such acts. But alone, it was too remote, and was properly excluded. The testator might have acted under the advice of his son, in his ordinary affairs, and even been influenced by that advice; and still we do not see, that it, alone, would tend to prove that he used undue influence in procuring the execution of the will. The same is true of the evidence of the witness Dunn, which was suppressed. It is urged, that the court below admitted improper evidence in favor of defendants in error. Jarvis testified, in reference to the execution of the will, that testator either signed the will in his presence, or acknowledged his signature to him, but could not remember which. There was no error in admitting this testimony. If the testator did either, it was all the statute requires, and he swears in positive terms, that the testator did the one thing or the other. If so, the requirements of the statute are answered. It is also insisted, that the court erred in admitting the oral evidence in reference to the testator not holding an equitable title to particular lands devised to the heirs of Benjamin Brownfield. On the question of the testator's mental capacity, it tended to show, that his memory was good; that his sense of justice was unimpaired; that his judgment, as to the best means of preventing subsequent litigation with those holding the equitable title, was sound. For that purpose it was properly admitted, and plaintiffs in error could by instructions have limited it to its legitimate effect.

It is insisted, that the court erred in not permitting counsel for plaintiffs in error to show the will to the jury on the argument. While we can perceive no valid reason for prohibiting counsel from arguing the case in his own manner, so long as he confines it to the evidence and the legal principles involved, and he is respectful and decorous, still it does not appear that this was an error for which the decree should be reversed. The will was in evidence before the jury, and they no doubt

had it in their retirement, where they could examine it, if they regarded it material to the formation of a correct verdict.

There were a very large number of instructions asked by both parties, a portion of which were given and a portion refused. Taking all of the instructions together which were given, and they fairly and fully present the law applicable to the evidence adduced upon the trial. A portion of those asked by plaintiffs in error may present correct abstract legal propositions, but are not based on the evidence, or the principles which they announce are embodied in those that were given. Others were erroneous, and, therefore, properly refused. The case seems to have been fairly presented to the jury on both the evidence and the instructions, and, while there might have been a conflict of evidence, had the excluded portion of the depositions been received, still the evidence would have largely preponderated in favor of the finding of the jury. But, with that evidence excluded, as it properly was, it is not claimed that the finding is against the weight of the evidence.

It appears that testator was a man of good business capacity, had filled several offices of responsibility, and requiring large information, good judgment, and more than an ordinary degree of force of character; and the witnesses all concur that there was no perceptible diminution of capacity up to the time of his making the will. Nor is there any evidence that Thomas did any act for the purpose of influencing his father in making it. It is true that he seems to have said to one of his daughters, that he would make no will, as the law made a suitable distribution of his property, but to others, not members of his family, he stated that he had made a will, and to one witness he stated that he had left all to Thomas. It was not for the jury, nor is it for the court, to say that he did wrong in making this disposition of his property, as the law gives the right to every one to dispose of property as he may choose. The law presumes that a will properly executed and attested is valid until the presumption is overcome by clear and satisfactory proof, which the evidence in this case fails to do.

It is insisted that the court below, after overruling the motion

for a new trial on the issue of fact, should have then heard the whole of the evidence, as well that admitted as the portions rejected. This proceeding is under, and must be governed by, the sixth section of the statute of wills. It declares that a bill may be filed at any time within five years after a will has been probated, to contest its validity. It also declares that it shall be tried by a jury in the Circuit Court of the county where the will has been recorded, according to the practice of courts of chancery in similar cases. Under this section, had the evidence failed to sustain the verdict, it would have been the duty of the court to set it aside, and have the question submitted to another jury. The object of the statute is to have the question determined and settled by a jury. But, if this were not so, the evidence in the case which the court had already heard, when submitted to the jury, did not require that a different decree should have been rendered. There was no necessity for going through the form of a hearing, simply to deny the relief which the verdict of the jury found plaintiffs in error were not entitled to receive. The decree of the court below is affirmed.

Decree affirmed.

CORNELIA A. STREETER
v.
ELIJAH S. STREETER.

1. VARIANCE — *between the description of a note and one produced in evidence — as to its date — fatal.* Where a note is described in the declaration as bearing date April 6, 1864, and the one produced in evidence bears date September 6, 1864, such variance is fatal. The date of a note is a matter of essential description, and must be precisely proved.

2. SAME — *when question of, cannot be raised.* But, in such case, if the execution of the note is proved, the question of variance cannot be raised, as such note is then admissible in evidence under the common counts.

3. PLEADING — *immaterial facts pleaded — become material — upon tendering an issue upon them.* Where, in an action in assumpsit, upon two notes, the defendant pleaded certain torts by way of recoupment, which the plaintiff

denied by his replication,—*held*, that the plaintiff, by tendering an issue upon them made the matters thus pleaded a material subject of inquiry. Had he supposed no issue could be made up on the facts alleged, he should have demurred.

4 AGREEMENT—*interpretation of.* Where A, in the possession of certain land under a lease, upon which was situated a house, and cistern containing wholesome water, and an orchard, made an agreement with B to surrender to her the remainder of his demised term to said premises, and "to deliver up full and complete possession of said land" to B immediately upon the execution thereof,—*held*, that the words "to deliver up full and complete possession of the land," fairly imply a delivery of the land, house, cistern and orchard, in as good condition as they were at the time of the execution of the agreement, natural deterioration, decay and inevitable accident, excepted.

5. LEASE—*what covenants—law will imply.* The law will imply covenants against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises.

6. CONTRACTS—*will be construed according to the intention of parties.* The rule is well established, that contracts should receive a reasonable interpretation according to the intention of the parties entering into them, if the intention can be gathered from the language employed.

7. RECOUPMENT—*of mutual demands arising out of the same subject matter.* It is not necessary the opposing claims should be of the same character in order that they may be adjusted in one action by recoupment.

8. SAME—*claim originating in contract—when may be set up against one founded in tort.* A claim originating in contract may be set up against one founded in tort, if the counter claims arise out of the same subject matter, and are susceptible of adjustment in one action.

9. SAME. And the converse of this proposition is true, that damages for a tort, in relation to the same subject matter on which the suit on the contract is brought, may be adjusted in that action by recoupment.

10. SAME—*concerning its benefits.* The doctrine of recoupment tends to promote justice, prevents needless litigation, avoids circuity of action and multiplicity of suits, by adjusting in one action adverse claims growing out of the same subject matter.

11. SAME—*how different from case of a technical set-off.* But unlike the case of a technical set-off, no excess can be recovered.

12. COVERTURE—*when and how may be pleaded in bar, or given in evidence.* Coverture, at the time of the entering into a contract upon which suit is brought, may be pleaded in bar, or given in evidence to defeat a recovery under the general issue *non-assumpsit* or *non est factum.*

13. SAME—*when must be pleaded in abatement.* But, when coverture has taken place since the time of entering into the contract sued upon, it must be pleaded in abatement.

Statement of the case.

14. STATUTES — *concerning act of* 1861 — *relative to married women.* The act of 1861, relative to married women, does not in any wise remove the disability of the wife in respect to contracts made with her husband.

15. JUDICIAL NOTICE — *of what the court will not take.* A court cannot take judicial notice of the fact, that suitors in certain proceedings before it, have been divorced, not even if the decree of divorce was pronounced by the same court.

16. EVIDENCE — *of divorce — must be by record proof.* Proof of a divorce, can only be established by the record, unless the fact be properly admitted.

17. CONTRACTS — *to be construed by the court — effect of misinterpretation of words used.* It is a legal duty pertaining exclusively to the court, to put its own construction upon contracts in evidence before it, and if in so doing a word is misinterpreted, material to the contract, though it would be error, yet it might not of itself be sufficient ground on which to set aside a verdict, unless the jury were thereby misled.

18. WORDS — "*immediately,*" *definition of.* The word "immediately" is not to be used in the same sense, or to convey the same meaning, as the word "practicably." The former includes the latter, but not so the latter the former.

19. SAME — "*practicably.*" The word "practicable" means that which may be done, practiced, or accomplished,—that which is performable, feasible, possible; and the adverb "practicably" means in a practicable manner.

20. CONTRACTS — *concerning the time of performance.* Where two contracts were made between two parties, one, that certain premises should be immediately surrendered to the other, and the other contract, that the party surrendering the premises should take his effects away from the same whenever the other was ready to remove thereon,— *held,* that the two contracts were consistent with each other. In one, possession was to be given immediately; and, in the other, the removal of the effects was to be as soon as practicable, the law allowing to him a reasonable time.

21. SAME — *meaning of words used in — to be given by the court — except words of art or science.* It is the province of the court to give the meaning of words used in a contract in evidence before it, unless they are technical expressions, or terms of art, or science, which experts alone can explain; and it is error to leave such interpretation to be made by a jury.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an action of assumpsit, brought by the appellee, in the court below, against the appellant, upon two promissory notes, one for the sum of $50 and the other for $100. The cause was tried before a jury, who rendered a verdict for

$169.20 against the defendant, upon which judgment was rendered; whereupon, an appeal was taken to this court. The facts necessary to an understanding of the questions presented for decision here, are stated in the opinion.

Messrs. BUCKLEY, MARCY & HUNT, for the appellant.

Messrs. SKINNER & MARSH, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The questions presented by this record are, first, as to the refusal of the court to exclude the note for one hundred dollars, offered in evidence by the plaintiff, on the ground of variance. The note is described in the declaration as bearing date April 6, 1864, and the one offered in evidence, and admitted against the objection of the defendant, bore date September 6, 1864.

That this is a substantial variance, cannot be questioned. The date of a note is matter of essential description, and must be precisely proved. *Spangler* v. *Pugh*, 21 Ill. 85.

The appellee insists, that this question of variance cannot be made, because the common money counts are sufficient, under which it could be admitted, its execution having been proved by a competent witness.

Appellant admits, if its execution was proved, it could be admitted under those counts, and such is the law. The action was brought on two notes, and George A. Hunt, a witness for the defendant, stated, when testifying to the agreement between these parties, signed by the appellee, that the agreement and notes sued on were executed at the same time. The paper (agreement) was signed and executed by appellee in his presence, and its execution and the notes were parts of one and the same transaction. This question is thus settled, and there was no error in admitting the note in evidence under the money counts, its execution by the defendant having been proved.

The next question made by appellant is, excluding proper testimony offered by her under her fourth plea, which was this: That the sole and only causes of action on which the

declaration is founded are the notes therein mentioned; that, when they were made, plaintiff was in possession of certain land of defendant, claiming to hold the same under a lease from her to plaintiff for a term of years not then expired, upon which land was a house, a cistern containing wholesome water, and a large number of fruit trees in good condition; that, at the making of the notes, plaintiff agreed with defendant, that he would, immediately upon the execution and delivery of the notes, deliver up possession of this land, house, cistern water and fruit trees, in as good condition as the same were then, and surrender to defendant his claim to hold the land under the lease; that this agreement was the sole consideration of the note; that plaintiff did not keep his agreement; that he did not, immediately upon the execution and delivery of the notes, or at any time afterward, deliver up the possession of the land, together with the house, cistern, etc., to defendant, in as good condition as the same were at the time of making the notes; that he withheld the possession of the land, house, etc., from defendant for a long time after the making the notes; that, while so withholding the same, he, by gross negligence, permitted the house to be destroyed by fire; that he caused coal oil to be poured into the cistern so as to render the water in it unwholesome, and girdled and killed the fruit trees; that, by reason of this failure to perform the agreement, defendant has suffered damages to the amount of five hundred dollars, which she offers to set off against the notes. This plea is accompanied by a bill of particulars, claiming therein two hundred dollars damages.

Each of the allegations in this plea was separately replied to by a denial of them. The fifth replication alleged that it was part of the agreement in the plea mentioned, that plaintiff might retain possession of the land, house, etc., for a few days, and until notified to remove therefrom by the defendant; and that he did surrender them in a few days, to wit, ten days thereafter and when notified so to do by defendant, and that she accepted the same in full performance of the agreement. Defendant rejoined to this replication denying the allegations.

Issues were made upon these replications, and on the rejoinder by defendant.

What were the issues on the four replications to the fourth plea? First, that the alleged agreement was not the consideration of the notes; second, that the plaintiff did not make the alleged agreement; third, that he performed his agreement to deliver up the possession of land, cistern and fruit trees in as good condition as they were when the agreement was made, and to surrender his claim to hold the land under the lease; and, fourth, that he did not, by his gross negligence or otherwise, permit the house to be destroyed by fire, nor cause coal oil to be poured into the cistern, nor girdle or destroy the fruit trees.

These were the issues before the jury, together with the one above stated, made by defendant's rejoinder to plaintiff's fifth replication setting up a new agreement.

The appellee contends that the allegations of *tort* in this plea are immaterial in this action, — that they are not of the substance of the plea, but surplusage, upon which no issue could be formed in any way affecting the case. But has not the plaintiff made those allegations material by tendering an issue upon them by this, his fourth, replication? Had he supposed no issue could be made upon the facts alleged, he would have made an issue of law thereon by a demurrer. These *torts* are pleaded by way of set-off or recoupment against the notes, and the plaintiff denied them — he made them, by his replication, a material subject of inquiry. He now insists, if the plaintiff did these acts, case is the proper remedy for damages by the landlord, and the only remedy, except there be a special contract against such acts, or for delivery of the possession in a certain condition, which is not shown by the record.

This leads to the inquiry, what is the true construction of the contract to deliver the possession of the premises to the landlord? It is averred in the plea, that the premises were to be delivered up "in as good condition as the same were then," whereas, by the agreement in evidence, the plaintiff agreed "to deliver up full and complete possession of the lands," and

this does not imply, that the premises should be in the same good condition. Is this so? It is usual, in contracts of lease, to stipulate, that at its termination the premises shall be delivered up in as good repair as when they were leased, natural deterioration and decay excepted; but, is not this a fair implication, without those words? And, does not the replication admit they were to be surrendered as they were when the agreement was made? In an ordinary lease, the law will imply covenants against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises. *Wade* v. *Halligan*, 16 Ill. 508. And it is a well recognized rule, that contracts should receive a reasonable interpretation, according to the intention of the parties entering into them, if the intention can be gathered from their language. *Crabtree* v. *Hagenbaugh*, 25 id. 233. Can the intention of these parties be doubted or misunderstood? Was it not contemplated by both, in the absence of express covenants, that the delivering up full and complete possession of the land, included the house, cistern and orchard, as they were at the time the agreement was executed, natural decay and inevitable accident excepted? It requires no argument or authority to show this; it is too plain for either, and it is admitted by the replication.

As to the argument of appellee, that the torts charged could not be given in evidence, and, therefore, evidence relating to them was properly rejected, this court held, it was not necessary, that the opposing claims should be of the same character in order to an adjustment in one action by recoupment. A claim originating in contract may be set up against one founded in tort, if the counter claims arise out of the same subject matter, and are susceptible of adjustment in one action. *Stow* v. *Yarwood*, 14 Ill. 424; *Brigham* v. *Hawley*, 17 id. 38; *Conger* v. *Fincher*, 28 id. 347.

We are at a loss to perceive why the converse of this proposition should not also be the law, — that damages for a tort in relation to the same subject matter in which the suit on the contract is brought, should not be recouped.

As this court said in *Schuchmann* v. *Knoebel, Exr.*, 27 Ill. 178, there is a natural equity, as to claims arising out of the same transaction, that one claim should compensate the other and the balance only be recovered.

It was held in *Lunn et al.* v. *Gage*, 37 Ill. 19, where a tenant entered into possession of a hotel under a lease in which the lessor covenanted to paint the building, erect a stable, and lay a side track to a cattle yard connected with the leased premises, and the landlord failed to do these things, the tenant, after abandoning the premises, was held liable for the rent for the time he occupied; but it was held also, if he suffered loss by reason of the landlord failing to repair in a reasonable time, he could recoup such damages against the rent.

In *Peck* v. *Bligh et al.*, 37 Ill. 321, the case of *Piggott* v. *Williams*, 6 Madd. 95, is referred to, where a solicitor was attempting to enforce a demand for services, and the defense was, the negligence of the solicitor in the performance of the services, and it was allowed on the principle of recoupment. See 2 Story's Eq. Jur. § 1436, note.

This doctrine of recoupment is becoming popularized in the realm of the common law; for, as was said in *Stow* v. *Yarwood*, *supra*, it tends to promote justice, prevent useless litigation, avoids circuity of action and a multiplicity of suits, adjusting in one action adverse claims growing out of the same subject matter, which can generally be much better settled in one proceeding than in several. But unlike, as in a technical set-off, no excess can be recovered.

In this case, the subject matter is the same. The note was given in consideration that the premises should be surrendered in as good condition as when received. The claim to a recoupment consists in damages done to the premises after the contract was made and prior to the surrender. Why turn the defendant round to her action to recover damages for the injury, when it could be estimated and allowed in the action on the note, and, if they equaled the amount of the note, then let the verdict go accordingly? Why, in any case, should there be this circuity of action, when in one action matters of

this nature can be fully investigated and adjusted? In this case, the recovery was sought on the money counts, so far as the one-hundred-dollar note was concerned, for it was evidence only in support of those counts, and to reduce the recovery on them this matter in recoupment was proper. The plaintiff had made it material by tendering an issue upon the facts alleged as the ground of the recoupment.

On the general principle of the right of recoupment, the case of *Christy* v. *Ogles' Executor*, 33 Ill. 295, the opinion in which was delivered Chief Justice CATON, and the last he delivered from this bench, can be read with instruction and advantage on this subject. There it was held, in an action of assumpsit on a promissory note given for land, the deed covenanting against incumbrances that an incumbrance on the land could be claimed by the makers in recoupment of damages in the action on the note. For the breach of the covenant in the deed against incumbrances, the defendant was entitled to recoup the amount of the damages he had sustained by reason of such breach. On the plaintiff's own admission, the premises being to be surrendered on a certain consideration, there may be recoupment for a tort, and, as we have construed the contract to be a surrender of them in as good condition as they then were, and as the plaintiff's replication admits, and if they then had a house as part, a cistern with wholesome water, and growing fruit trees, it was competent to show the premises when surrendered were despoiled by the plaintiff in the manner the defendant proposed to prove. There was no objection to the form of the interrogatory put to the several witnesses; and excluding evidence on those points was error.

The action not being on the note for $100, the claim to recoup went to the damages claimed by the plaintiff under the common counts, and under one of them, that for money had and received by defendant of plaintiff, any thing which should show the plaintiff, *ex equo et bono*, ought not to recover, may be given in evidence, especially if the matter offered grows out of the same subject matter, under the general issue.

Another point made by appellant is, that the court refused

to permit the defendant to prove she was under coverture at the time the notes were made, — that she was the wife of the plaintiff.

Coverture at the time the supposed contract was entered into, that is the execution of the notes sued on, may be pleaded in bar or given in evidence under the general issue, *non assumpsit* or *non est factum*. 1 Ch. Pl. 437. And further on it is said, when the defendant insists that no such contract as that stated in the declaration was in fact made, he must plead the general issue. Under this plea, he may give in evidence various matters of defense, which in effect admit that a contract was made, but deny that it was obligatory on the defendant, or that another person ought to be made a co-plaintiff, also the defendant's incapacity to contract, or that, at the time the supposed contract was entered into, the defendant was an infant, a lunatic, or drunk, or a *feme covert;* but coverture which has taken place since the making of the contract must be pleaded in abatement. 1 Ch. Pl. 470.

These defenses show that the plaintiff never had any cause of action. The court then erred in excluding testimony of the fact of coverture at the time the contract sued on was made. We do not conceive the act of 1861, enfranchising married women, has any application, even by a most liberal construction, to a case of this kind. The great object of that statute was to protect the property of such from the husband and his creditors, and it would, in most cases, be defeated if the husband was permitted to obtain promissory notes from the wife and then coerce the collection, to say nothing of the great domestic disquiet it would produce. We do not admit the court could take judicial notice of the fact that the parties were divorced, even if the decree of divorce was pronounced by the court trying these issues. Record proof is required in all such cases, unless the fact be properly admitted. The court or judge who granted the divorce is not permitted to call in requisition his own personal knowledge or recollection of the fact that such a decree had passed at any time.

A criticism is indulged in by appellant on the instructions

two and three given for the plaintiff, or rather upon the word "immediately," as understood and explained by the court. It was the province of the court to put its own construction upon the contract; that is a legal duty pertaining exclusively to the court, and if they have misinterpreted one word material in the collocation of words, or prominent in the contract, though it might be error, it might not of itself be sufficient ground on which to set aside a verdict, unless the jury were misled thereby. The word "immediately," as used in the plaintiff's contract to deliver up the possession of the premises, the court told the jury meant "as soon as could practically be done."

Eminent lexicographers define the word to mean something quite different. Worcester (and no one can question his transcendant ability in lexicography) defines "immediately," first, without the intervention of any other cause or event — opposed to "mediately;" second, instantly, directly, without delay, forthwith, just now. "Immediately" implies without any interposition of other occupation; instantly, or instantaneously, in an instant, or without any intervention of time; directly, without any division of attention.

The adjective "immediate" is defined as having nothing intervening either as to place, time or action; it is direct, proximate.

"Practicable" is that which may be done, practiced, or accomplished, that which is performable, feasible, possible; and the adverb "practicably" means, in a practicable manner.

Without insisting that the term "immediately" shall, in legal parlance, be confined to the same strictness, as, by the correct rules of philology, it seems to be confined, we are unable to understand that the use, by the court, of the word "practicable," conveyed to the jury the sense and meaning of the word "immediately," as used in the agreement. The former contemplates action much less speedy than the latter, and the intervention of many things not contemplated, it would seem, by the use of the latter word. They are not convertible words, for, while "immediately" includes "practicably," the latter does not include the former; and they are not synonymous. The

court authorized the jury, by the second instruction, to excuse the plaintiff, in surrendering the possession, from that diligence the terms of the several agreements imposed upon him.

The appellee insists, that the contract made on the same day between these parties, respecting certain chattels and effects which were on the premises belonging to the plaintiff, and which he had the liberty to remove, modified the obligation under which he was to give up the possession, and narrowed it down to a time when it might be practicable for him to remove these chattels; that so long as they remained on the premises, so long was the possession to be withheld.

As we understand the two contracts, the plaintiff agreed to deliver up full and complete possession to the defendant immediately upon the execution of the two notes. The consideration of this agreement to surrender, was the release, by the defendant to the plaintiff, of all her claims upon certain personal property then on the premises, and the agreement by the defendant to deliver plaintiff twenty-five bushels of apples then on the land, and the execution of these notes. At the same time the defendant, to whom the premises were to be "instantly" surrendered, executed the other agreement, expressing her assent in the ownership by plaintiff of the personal property described in it as being on the premises, and permission was given him to take them away as soon as they could be removed.

It cannot surely be a proper inference from these terms, that the plaintiff had the right to defer the surrender of the possession until he got ready to remove his effects. Full and complete possession was to be given immediately; his effects to be taken away from the surrendered premises whenever the plaintiff was ready to remove them, and for this the law would allow him a reasonable time, so that the two agreements are perfectly consistent. The possession was to be given "immediately;" the removal of the chattels and effects as soon as "practicable."

With the view we have taken of this case, the second instruction was wrong, "immediately" not having the meaning the court gave to it; and the third instruction, leaving it to

the jury to say what the word did mean, was also wrong, for it is the office of the court, and of the court alone, to interpret contracts, and give a meaning to the words used in them, unless, perhaps, there be technical expressions, or terms of art or science, which experts only can explain.

For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

EBENEZER RAND
v.
BRYANT T. SCOFIELD.

1. EVIDENCE—*tax receipts are not conclusive upon the question—on whose account and for whom payment was made.* Upon the question, on whose account and for whom payment of taxes has been made, the tax receipts therefor are not conclusive evidence. Like other receipts, they are susceptible of explanation.

2. TAXES—*payment of, may be made by an agent.* A principal can claim in support of his title the benefit of taxes paid by his agent, without reference to the state of accounts between them.

WRIT OF ERROR to the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

The facts in this case are sufficiently stated in the opinion of the court.

Mr. DAVID MACK, for the plaintiff in error.

Mr. N. BUSHNELL, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of ejectment brought by Scofield against Rand for the recovery of seven-ninths of a tract of land in Hancock county. The plaintiff proved a title derived from the patentee. The defendant claimed under color of title

and seven years' payment of taxes. The case was tried without a jury, and the court found the issues for the plaintiff.

It is admitted by the counsel for defendant in error, that the defendant below showed color of title. It is denied, however, that the proof of payment of taxes was satisfactory. The proof was made by one Henry Merrill, who came from the State of New York to Fulton county in this State in 1838, and has resided there ever since. Before leaving New York, he sold and conveyed the land to his brother, Alonzo Merrill, receiving a part of the purchase-money in hand and the residue afterward. The witness testifies that he began to pay the taxes in 1839, as agent of Alonzo Merrill. The land was, however, several times sold for taxes, so that the only seven consecutive years of payment were from 1848 to 1855. In 1856 the land was sold by Alonzo Merrill to the landlord of the defendant. The tax receipts for the above mentioned seven years were introduced, and although one of them was in the name of one Jesse Bennett, yet that fact is explained by the witness, who swears he sent the money to Bennett, for paying the taxes, and the receipt was sent back to them in a letter. Other receipts were in his own name, but the witness says, that all the payments were made by him as agent of Alonzo Merrill.

The real question in this case is, on whose account and for whom were the taxes paid? On that point the tax receipts are not conclusive. Like other receipts they are susceptible of explanation. *Hinchman* v. *Whetstone*, 23 Ill. 188. In this case, the witness swears that he paid the taxes during the seven years for his brother, who had the color of title, and produces the receipts, and explains in a satisfactory manner the discrepancies on their face. Inasmuch as his brother claimed the land and he did not, the statement that, in paying the taxes, he paid as agent for his brother, is certainly reasonable. He was cross-examined at some length for the purpose of showing whether his brother had advanced money to him for the taxes, or had refunded his expenditures. All this, however, was utterly immaterial if, as he swears, his brother had requested him to pay the taxes, and if, acting under said request, he did

pay them as his brother's agent. The principal can claim, in support of his title, the benefit of taxes paid by his agent, without reference to the state of accounts between them. The witness, however, swears that, after he sold the land to his brother, the latter sent him twenty dollars to apply on taxes, and that, in 1856, Hamilton W. Merrill, who had bought the land from Alonzo, settled and paid his account in behalf of Alonzo.

So far as the record shows, this is a plain case for the defendant. Perhaps the court below discredited the statements of the witness, as we are urged to do, but, although he seems to show a desire to sustain his brother's title, he is, on the main point, corroborated by the possession of the tax receipts, and we discover no grounds in the record for refusing our belief to his testimony. The judgment must be reversed and the cause remanded.

Judgment reversed.

GEORGE TITMAN
v.
JOSHUA J. MOORE.

1. HOMESTEAD — *occupation by the widow.* This court has held, that, under the second clause of the first section of the homestead law, a widow entitled to claim its benefits, and in infirm or delicate health, does not lose the benefit of the act by leaving the homestead to remain temporarily with her friends, for the benefit of her health, leaving the premises occupied by a tenant during her absence.

2. *Occupancy, after the husband has abandoned the family.* And it has also been *held*, that, under the amendatory act of 1857, where the husband abandoned his wife and family, she might remain and hold the homestead as against his acts or those of his creditors.

3. Also, that a husband by being temporarily absent while in pursuit of a new home, did not thereby forfeit the right to claim his homestead.

4. NEW RESIDENCE — *when a waiver of the homestead.* But a person having acquired a new residence, although not a homestead, cannot be permitted to insist upon the homestead right, to defeat a deed or mortgage executed by

him while occupying such newly acquired residence, and which fails to release the benefit of the act, unless it clearly appears that the new residence was only temporary.

5. So, where a person left his farm, and removed to a town six miles distant, where he voted at two local elections, first renting his farm for three years, at the end of one year terminating that agreement, and renting it anew for five years, and, after having been eighteen months absent from his farm, executed a mortgage, which did not release the benefit of the homestead act, — *held*, that the mortgagee took his lien free from the operation of the homestead act, and that the right to a homestead was not restored by a subsequent return to, and residence on, the farm.

6. ABANDONMENT — *effect as to subsequent liens.* The husband, being the head of the family, has the right to determine and control their residence; and, when he intentionally removes from and abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens, which have attached during such abandonment.

7. OCCUPANCY — *by the husband, different from that of the family.* The homestead law seems to imply by its terms, that, where its benefits are claimed by the husband, it must appear, that he occupied it as a residence, lived upon it, and made it his home, and that of his family; and thus an occupancy of a husband by a tenant is not sufficient. But a simple occupancy by the widow or the children is sufficient, and their occupancy may be by a tenant.

8. *Temporary abandonment by the husband.* While the court adhere to the former decisions, that a debtor may leave his home for temporary purposes without losing the benefit of the homestead act, they also hold, that the intention to return and occupy it as a homestead, must be clearly manifested by surrounding circumstances.

9. LIENS — *how affected by the acts of the debtor.* The right to claim the benefit of the homestead act, is controlled by the situation of the property at the time the debt was contracted, or the lien attached, and not by the subsequent acts of the debtor and his family. If the premises are not exempt at the time of creating the debt or lien, a subsequent possession of the homestead would not exempt it. On the other hand, the homestead may have been exempt at the time the debt was contracted, and become liable by its subsequent abandonment.

WRIT OF ERROR to the Circuit Court of Fulton county; the Hon. C. L. HIGBEE, Judge, presiding.

George Titman filed a bill in chancery, in the Circuit Court of Fulton county, at the June Term, 1861, against Joshua J. Moore and Ann A. Moore, his wife, asking for the foreclosure

of a mortgage. There was a decree entered by default, and a sale thereon. In February, 1863, the master made his report of the sale to the court, and it was approved. On the 2d day of March, 1863, upon the motion of Moore, the order approving the report was set aside. Moore thereupon moved the court to set aside the decree of foreclosure and the sale, upon the alleged ground, as set forth in his own affidavit, that the mortgaged premises were his homestead, and had been sold by the master without reference to his rights in that regard therein. This motion was overruled, and a writ of error was sued out by Moore, and the case was heard and determined in this court on the errors assigned, at the January Term, 1864. See *Moore* v. *Titman*, 33 Ill. 358, where a full statement of the facts in the case up to that time will be found. The opinion then rendered disposed of all the questions in this case, except that of homestead. Upon that point it says:

"Where the master proceeds to execute the decree, he must, like a sheriff under an execution, ascertain whether the homestead right exists. If so, he must proceed in the manner pointed out in the statute, to make the sale under the decree. And if he fail to do so, the defendant may, after the coming in of the report, enter his motion to set aside the sale. Upon that motion the court will hear the evidence of the parties and determine the question of whether the right exists, and if so, set aside the sale."

Under this ruling the case went back to the Circuit Court. On the 15th day of September, 1864, Titman filed in the Fulton Circuit Court his affidavit, in response to the affidavit of Moore, claiming a homestead.

This affidavit alleged, that, on the 13th of August, 1858, Moore being then indebted to Titman, obtained a further loan from Titman, and in consideration thereof executed the mortgage; that Moore at that time resided with his family, and had his home in the city of Canton, six miles distant from the said premises; that said premises were then occupied and cultivated by other persons; that shortly before the execution of the mortgage, Titman was informed both by Moore and his wife that they

had resided and had their home in Canton for more than a year before that time. Upon the two affidavits the Circuit Court referred the cause to the master in chancery, to hear and report the testimony upon the issue "whether the right to claim a homestead exemption by the defendants existed or not."

The evidence is very voluminous. It supports the allegations of the affidavit of Titman as stated above, and shows also that Moore voted on the 28th of December, 1867, the 5th of April, 1858, and the 4th of April, 1859, at the city elections in the city of Canton; Daniel Bricker and John Bricker, formed a partnership with Moore, and took a written lease for the premises in controversy, from him about Christmas, 1856. About that time Moore moved to Canton. This lease was for three years, but was canceled by agreement at the end of one year, and in the spring of 1858, the Brickers gave up the possession. During the year of 1858, William Williamson resided on the premises, under a verbal contract with Moore for a partnership in the farm, stock, etc., for five years. In April, 1859, Moore returned to the farm with his family.

Upon hearing the evidence, the court decreed, that as against Titman, Moore was entitled to a homestead. The former sale and decree were set aside. The master was directed to sell the premises, setting apart the homestead as provided in the statute. Titman now brings the cause to this court upon a writ of error, to reverse the decree.

Mr. JOHN S. WINTER, for the plaintiff in error.

Mr. N. BUSHNELL and Messrs. JOHNSON, HOPKINS & POWELL, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

Had defendants in error abandoned their right to claim the benefit of the homestead exemption in the mortgaged premises at the time that instrument was executed? It appears, that defendants in error had left the farm, and were, with their

family, residing in the city of Canton, and had been for about eighteen months when the mortgage was given. The farm is distant about six miles from the city. When they removed to the city, Moore rented a house and resided in it with his family. When he left the farm he placed a person in possession, under a written agreement, that the latter should stock and cultivate the farm, and that they should equally divide the profits or losses. This agreement extended to the period of three years. At the end of the first year, however, the arrangement terminated, and another person went into possession of the farm, under a verbal agreement, for five years, the terms of which were similar to those made with the first occupant.

This court has held, that under the second clause of the first section of the homestead law, a widow entitled to claim its benefits, and of infirm or delicate health, does not lose the benefit of the act by leaving the homestead to remain temporarily with her friends, for the benefit of her health, leaving the premises occupied by a tenant during her absence. Again, that under the amendatory act of 1857, where the husband abandoned his wife and family, she might remain and hold the homestead against his acts, or those of his creditors. And that a husband by being temporarily absent while in pursuit of a new home, did not thereby forfeit the right to claim his homestead.

Upon a careful examination of the first section of the act, it will be perceived, that the language in reference to the occupancy, during the life of the husband, and after his death, is different, and seems to imply, that it was intended to provide for different kinds of occupancy. The first clause exempts the property held by the debtor, and "occupied as a residence," while, in the second clause, the right is reserved to the widow and family after the death of the husband, for the limited period, "some of them continuing to occupy such homestead." The first clause requires the occupancy to be as a residence while the other is satisfied simply by an occupancy. This would seem to imply, that it was intended, that where the right is claimed by the husband, it must appear, that he

occupied it as a residence, lived upon it and made it his home and that of his family; while, under the second clause, an occupancy seems to answer the requirement. And premises may be occupied by a tenant, whose possession is considered that of his landlord. And this construction would seem to be imperatively required to render the right available to children of tender years, where both parents are dead. Otherwise, the right would be useless to them.

The husband, being the head of the family, has the right to determine and control their residence. And, where he intentionally removes from and abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens which have attached during such abandonment. Where a lien attaches during such abandonment, it is no more defeated by returning to and regaining possession than if there had been a regularly executed release of the right. Such return would operate as a new homestead right as to all subsequent debts and liens, but could not affect prior claims any more than if it had not been previously occupied as a homestead. The right to claim the benefit is controlled by the situation of the property at the time the debt was created or the lien attached, and not by subsequent acts of the debtor and his family. While the homestead may be exempt when the debt was contracted, by its subsequent abandonment the homestead would become liable; but if not exempt at the time of creating the debt, the subsequent possession of the homestead would not exempt it. That can only be accomplished by the debtor by paying or discharging the debt.

In the case of *Cabeen* v. *Mulligan*, 37 Ill. 230, this court held, that, where a person, having the right to hold the homestead against his creditors, leases it to another person, and removes from the State with his family, saying at the time he would remain if he found it to be his interest to do so, but otherwise he would return, he could not assert the right as to prior creditors after an absence of two years.

In the case we are now considering, defendants in error had

been residing in Canton, some six miles distant, between one and two years, when the mortgage was executed. The farm was then in the occupancy of a tenant, under an agreement, that he was to have the possession for between four and five years. And when they left the farm, the exclusive right to its possession had been transferred to another for three years. It is true, that this contract terminated by agreement at the end of the first year, but Moore then manifested no intention to return. On the contrary, he made a verbal agreement, that another person should occupy it for five years. While this latter agreement may have been within the statute of frauds, unless taken out of its operation by a part performance of the contract, still as to the question of intention on the part of Moore, as to the future occupancy of the farm as a homestead, it does not matter. These contracts clearly show, that he did not design to return again to the farm until the expiration of the time embraced in the latter lease, or agreement.

Again, the evidence shows, that while he resided in Canton, he voted at two of the city elections. From this fact we are compelled to conclude, that he then regarded Canton as his residence. It is true, that the evidence shows, that he at times spoke of returning to the farm, and to reside upon it; at other times he spoke of selling the farm and going south to find a new residence; and he seems to have entertained a variety of plans for his future life, and to have left the question of his return to the farm to be governed by circumstances. And the whole of the evidence, when considered, we think, shows that his purposes for his future course were neither definite nor fixed. And while in this state of uncertainty he made the mortgage on the farm, which he now claims was then his homestead.

While we adhere to our former decisions, which hold that the debtor may leave his home for temporary purposes, without losing the benefit of the right to the homestead exemption, we also hold, that the intention to return and occupy it as a homestead must be clearly manifested by the surrounding circumstances. But we cannot hold, that a person, having acquired a new residence, although not a homestead, can be permitted to

insist upon the homestead right, to defeat a deed or mortgage executed by him while occupying such newly acquired residence, but which fails to release the benefit of the act, unless it clearly appears that the new residence was only temporary. From an attentive examination of the entire evidence in the case, we are compelled to hold, that the homestead right was abandoned at the time this mortgage was executed, and that plaintiff in error acquired his lien free from the operation of the homestead act; and the right was not restored to Moore by his subsequent return to and residence on the farm. The decree of the court below, allowing Moore the benefit of the act, must be reversed and the cause remanded.

Decree reversed.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY

v.

THORNTON Y. SOUTH.

1. FORMER DECISION. The cases of the *Chicago, B. & Q. R. R. Co.* v. *Parks*, 18 Ill. 460, and *The St. Louis, Alton & Chicago R. R. Co.* v. *Dalby*, 19 id. 353, are not to be considered as deciding the law to be, that a railroad company is bound to keep open its office for the sale of tickets to passengers *beyond* the time fixed by its published rules for the departure of a train.

2. RAILROAD COMPANIES — *not required to keep open their ticket-office beyond the time fixed for the departure of trains.* Railroad companies are required to keep open their office for the sale of tickets to passengers for a reasonable time before the departure of each train, and up to the time fixed by its published rules for its departure, and *not* up to the time of *actual* departure.

3. SAME. They are required to furnish a convenient and accessible place for the sale of tickets, and afford the public a reasonable opportunity to purchase them, and parties who will not avail themselves of it are alone at fault, and must pay the extra fare, or, on refusal, be ejected from the train.

4. SAME — *of right to charge discriminating fares — dependent on what fact.* While the right of a railroad company to discriminate in its fare, between those purchasing tickets and those who do not, is just and reasonable, still such right depends on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate

5. Security for costs — *motion for — when made too late.* After issu joined, and the cause has been called for trial, a motion for a rule on the plaintiff to file security for costs, comes too late.

6. Trespass — *where several defendants, damages cannot be assessed severally against them.* In an action of trespass against several defendants, the jury cannot assess damages severally against them.

7. Instructions. And in each case, if the court so instruct the jury, it is erroneous, but such error is cured by the entry of *nolle prosequi* before judgment upon the verdict, against all the defendants but one, and taking judgment against him alone.

Appeal from the Circuit Court of Coles county; the Hon. Oliver L. Davis, Judge, presiding.

This was an action of trespass, brought by the appellee in the Circuit Court of Coles county, against the appellants, Frederick Austin, Charles Rhodes, Lorenzo Lee and Edward Dawson. The cause was tried before a jury at the April Term, 1866, of said court, and a verdict of guilty rendered against the defendants, and damages assessed severally against them. Whereupon, a *nolle prosequi* was entered as to all the defendants except appellant, and judgment was entered against it for $300. Motions for a new trial and in arrest of judgment were made, which the court severally overruled, and thereupon an appeal was taken to this court.

The facts necessary to an understanding of the questions presented to this court for its decision, are stated in the opinion.

Messrs. Wiley & Parker, for the appellants.

Mr. John Scholfield, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

The principal questions in this cause arise upon the instructions given on behalf of the plaintiff, and on those refused as asked by the defendants, the appellants here, and on the measure and amount of damages, the former of which we will notice.

The first instruction asked by the plaintiff, and given, was this:

"It was the duty of the St. Louis, Alton and Terre Haute Railroad Company to furnish a convenient and accessible place for the sale of tickets for passengers, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure; and if the jury believe from the evidence that the plaintiff, by and through Allison, made application at the ticket-office of the St. Louis, Alton and Terre Haute Railroad Company, at Mattoon, for a ticket from that place to Charleston, at any time within ten or fifteen minutes before the actual departure of its train, and he was unable to get a ticket in consequence of the ticket-office being closed, then the St. Louis, Alton and Terre Haute Railroad Company had no right to charge him upon the train any more than usual ticket price between Mattoon and Charleston."

The first instruction asked on behalf of the defendants and refused, was as follows:

"That if they find from the evidence that the defendant, St. Louis, Alton and Terre Haute Railroad Company, has a convenient and accessible office, supplied with and for the sale of tickets in Mattoon; that on the evening of the alleged trespass the same was open, with a competent person in attendance to sell tickets for an hour before and up to the expiration of the time fixed by public notice for the departure of the train on which plaintiff took passage; that the plaintiff got upon said train to travel from Mattoon to Charleston without procuring a ticket and refused to pay, or cause to be paid, to the conductor of said train the amount of fare or passage money required by the regular tariff of said company for passengers who fail to produce tickets, and that by reason of such failure of plaintiff to pay or cause to be paid such fare or passage money he was expelled from the cars of said company by the servants or employees of said company at a regular station on said railroad, then in that case the jury must find the defendants not guilty."

The point of difference is obvious. While the instruction for the plaintiff requires the ticket-office to be kept open up to the time "of the actual departure of the train," that for the defendant limits that duty "to the expiration of the time fixed by public notice" for the departure of the train.

It is insisted by the appellee, that the law is as declared in the instruction given in his behalf, and has been so held by this court in the case of the *Chicago, Burlington and Quincy Railroad Company* v. *Parks*, 18 Ill. 460, and reiterated in *St. Louis, Alton and Chicago Railroad Company* v. *Dalby*, 19 id. 364, and that the instruction is an exact transcript of the language of this court, in the cases cited.

In this the counsel is not mistaken. In the case first cited, this court said: "To justify a railroad company in making a discrimination in the fare against the passenger who neglects to purchase a ticket at the company's office, the company must see to it that the fault was not that of its own agent instead of the passenger. To justify this discrimination, every reasonable and proper facility must be afforded to the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of the tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train and up to the time of its actual departure, so that it shall really be a case of neglect and not of necessity on the part of the passenger, and not the fault of the company." Further on, in the next paragraph but one, the court call these remarks "suggestions," and give the reason why they were made, the point to which they apply not being in the case before them. The controversy there was this: Parks, an attorney-at-law, residing at Aurora, in Kane county, took the train there, without purchasing a ticket, for Batavia, the nearest point to Genoa, where the court was held, and which Parks was going to attend. He paid the extra fare required of those who pay on the car from Aurora to Batavia. At the latter place he changed his mind, and, as it was wet, disagreeable weather, he concluded, without purchasing a ticket, to proceed

on to Junction, another station on the road. The ticket-fare from Batavia to Junction was twenty cents, which Parks offered to pay to the conductor, but he refused it, demanding, under his instructions, an additional five cents, which Parks refusing to pay, the conductor put him off the train. This was the case in which the "suggestions" above quoted were made. The court, and the learned judge, afterward so long the honored chief justice of the court, who delivered the opinion, were well aware of the fact that the time of the arrival and departure of railroad trains was fixed, and made notorious by publication and notice in every conceivable mode, so that it may be safely asserted, the business and traveling public, all those whose pursuits required that mode of conveyance, and especially those living in the towns through which railroads pass, were perfectly familiar with the fact, and almost any inhabitant, if inquired of, could tell to a minute when any particular train was due at their town, and when it would leave.

In speaking, then, of the time of the actual departure of a train, up to which the ticket-office must be kept open, the court, unquestionably, meant to be understood as referring to the published fixed time which every body knew. The presumption being that trains will arrive and depart on their schedule time, which time is notorious, no rule should be established that should apply, without much hardship and great inconvenience, to the departure of trains not on time. We do not recognize any right in any person to apply at a railroad ticket-office after the time fixed and published for the departure of a train, and demand the same rights and privileges accorded to those who come at the proper time for their tickets It is well known that trains are sometimes delayed for hours, and that it is unavoidable. Would it not be going too far to require the companies controlling them to keep an agent at his post during all this delayed time? Tickets are not usually applied for by passengers after the time fixed for the departure of a train. The companies have a right to presume they will not be applied for after that time, and therefore their agents can close the ticket-office and go about their other business, of

which they have an abundance, if we are to judge from the number of trains upon our railroads. An agent at a railroad station who sells tickets is, not only "ticket agent," but he is the "station agent," and has much to do with freight and other matters requiring care and attention. It would be unreasonable to require him to neglect these matters, and confine him within reach of the small opening at which the tickets are delivered, waiting for a delayed train, and not a passenger applying for a ticket. It is sufficient for the company that a reasonable opportunity should be afforded passengers to procure tickets for the train he designs to go upon, and that reasonable opportunity is furnished by keeping a convenient office open under the charge of a competent agent, up to the advertised time fixed for the departure of the train. The facts in this case show that the ticket-office was open an hour before the train left, and continued open up to the time fixed for its departure. The plaintiff, coming after that time, took his chances to get a seat in the car, and, having no ticket, he was bound to pay car fare.

We are of opinion the court should have refused the first instruction for the plaintiff, and given the first asked by defendants, the company not being obliged to keep the ticket-office open beyond the hour fixed by its published rules for the departure of a train.

These being the views we entertain of the law of this case, the modification of the defendant's eighth instruction was also erroneous, as by that the office is required to be kept open up to the time of the actual departure of the train.

All that can be demanded of a railroad company is, that a reasonable opportunity shall be afforded the public to purchase tickets. If parties will not avail of it, it is their own fault, and if they get upon a train without a ticket, they must be subject to pay the car fare, or, on refusal, to be ejected from the car. In Parks' case, this court said the right to charge discriminating fares was just and reasonable, but it depends on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate of fare. This opportunity was afforded the appellee.

A minor point as to the ruling of the court on the motion and affidavit of defendant's counsel to rule the plaintiff to give security for costs on the ground of his insolvency, has been raised. The bill of exceptions shows this motion was made, and the affidavit is incorporated into it.

This motion was denied by the court.

The statute provides, "if in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, it shall be the duty of the court, on motion of the defendant or any officer of the court, to rule the plaintiff, on or before a day named, to give security for the payment of costs in such suit." Scates' Comp. 244.

The affidavit states that affiant had just learned that the plaintiff was insolvent, and at the time the motion was made the record shows issue had been joined and the cause had been called for trial. This court said, in *Selby* v. *Hutchinson*, 4 Gilm. 319, "that this motion was addressed to the discretion of the court, and the decision upon it could not be assigned for error." We think the motion was too late.

Another objection is made by appellant to the instruction to the jury, that they could assess damages severally against the defendants. The instruction was erroneous, but the error was cured by the entry of a *nolle prosequi* before judgment upon the verdict against Austin and Lee, and taking judgment against the company alone. 1 Tidd's Pr. 682. We cannot see that this instruction, wrong as it was, prejudiced the appellant in any way.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to award a *venire de novo.*

Judgment reversed.

Syllabus. Statement of the case.

RUSSEL HINCKLEY
v.
CITY OF BELLEVILLE.

1. BANKER — *definition of.* The term "banker" includes all the business of a money-changer; and this court understands the term, "money-changer," in the same sense as defined by Webster, — "a broker who deals in money or exchanges."

2. SAME — *business of — same as that of the money-changer.* The buying and selling of uncurrent funds, exchanging one kind of money for another, or the transacting of any kind of business included in the business of a money-changer, is equally a part of the business of a private banker, as carried on within this State.

3. When the charter of a city empowered its council to tax, regulate and license bankers, money-changers, and certain other tradesmen, and the city council, by virtue thereof, passed an ordinance requiring bankers to take out a license, — *held,* upon the question, as to whether the council possessed such power, the agreed case merely describing the party as a banker, without particularizing the kinds of business transacted by him, that the term "banker," as thus used, comprehends the various kinds of business ordinarily carried on by bankers in this State, and can be required to take out a license under that provison of the charter which applies to money-changers.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was an action prosecuted against the appellant, before a police magistrate of the city of Belleville, to recover the penalty for a violation of an ordinance of said city, requiring bankers to take out a license. Trial was had, and the appellant found guilty, and a fine of fifty dollars and costs of suit imposed. An appeal was taken to the Circuit Court of St. Clair county, where, by consent of the parties, the cause was tried by the court, upon an agreed statement of the facts, and judgment rendered in favor of the appellee, for $100 and costs. Whereupon the appellant prayed an appeal to this court.

Mr. M. W. WEIR, for the appellant.

Mr. WILLIAM H. UNDERWOOD, and Mr. JAMES M. HAY, for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The city of Belleville was incorporated in 1850, by an act of the legislature, giving it the same powers that were granted in the charter of Springfield. Under this charter it was authorized "to license, tax, and regulate auctioneers, merchants and retailers, grocers, taverns, ordinaries, bankers, peddlers, brokers, pawnbrokers, and money-changers." In 1859, a new charter was adopted with an express reservation of the powers contained in the old. The city council has passed an ordinance requiring bankers to take out a license, paying therefor $100, and the question presented by this record is, whether the council has the power to do this. The agreed case upon which this appeal comes before us, merely describes the appellant as a banker, without particularizing the kinds of business transacted by him. We construe the agreed case as meaning, that he transacts the business ordinarily done at private banking houses in this State. Without considering the question as to how far a banker and a money-broker are the same in the common parlance and business usages of this State, there is at least no doubt that the term "banker" includes all the business of a money-changer. A money-changer is defined by Webster to be "a broker who deals in money or exchanges." The word has passed out of common use, but when used, we understand it in the sense given by the learned lexicographer. Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part of it. So, also, the buying and selling of uncurrent funds, and the exchanging one kind of money for another, are equally the practice of the money-changer and the banker. Indeed we are not aware of any kind of business understood to be within the former term, which is not considered a part of the business of a private banker, as carried on within this State, and we must construe the term "banker," used in this agreed case, as comprehending the various kinds of business ordinarily carried on by bankers among our own people. If, then, the business of the banker includes that of the money-changer, he may certainly be required to take out

a license under that provision of the charter which applies to money-changers. While the appellant is a banker he is also a money-changer.

Judgment affirmed.

SAMUEL H. HOUSE
v.
CANFIELD S. HAMILTON.

1. ATTACHMENT—*levy, where to be made.* Under the statute, the officer having a writ of attachment to execute, may, if the defendant is in the act of removing his property, pursue it and make a levy in any county in this State. But, where the defendant had, several days before the suing out of the writ, removed his property to another county, and he swears that he was not removing his property, proof that he has been negotiating to form a partnership in Missouri will not create a presumption that he was removing it, and a levy made in that county, on a writ from the county from which the property has been removed, by the sheriff of that county, will not be sustained.

2. SAME—*jurisdiction.* To acquire jurisdiction by the court issuing the writ, there must be service on the defendant or a levy on property in the county from which the writ issues, unless the defendant is in the act of removing his property, when the officer may pursue it and levy in another county. But, where the writ is issued to the sheriff of one county, and he goes into another and levies on property which is not being removed, the levy is unauthorized and the court fails to acquire jurisdiction.

3. LEVY—*motion to quash.* Where such a levy has been made, the defendant may have it set aside on a motion to quash the levy. Such a motion presents the question whether the officer might execute his writ on property permanently located in a different county from that in which the writ was issued, or whether a writ may be issued in one county and executed in another because the defendant may have intended to remove it from the latter county. A plea in abatement, denying the affidavit would alone put in issue the question of intention of removal, and not of the jurisdiction of the court.

WRIT OF ERROR to the Circuit Court of the county of Hancock; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was a suit brought by Canfield S. Hamilton, by attachment, in the Hancock Circuit Court, against Samuel H. House.

A writ was issued to the sheriff of that county, who went to the county of Knox, where he levied upon property of the

defendant, which he had taken there several days previous. Defendant, at the next term of the court, entered a motion to quash the levy, and, in support of his motion, filed his own affidavit, stating that the property had been in Knox county twelve days; that he was not in the act of removing his property at the time or after the issuing of the writ, nor was he about to depart from the State, to the injury of his creditors. Other affidavits of the same purport, as to the status of the property, were also filed.

Plaintiff, on the hearing of the motion, introduced evidence, that defendant had, some time previous to suing out the writ, proposed to go with one person to Missouri and commence the livery business, but was to again return to Carthage before they left. He had prepared to and agreed to form such a partnership with another person, and was to meet him at Carthage or Quincy, when they were ready to go to Macon, Missouri, to carry out the agreement.

The court overruled the motion and defendant excepted. A trial was subsequently had, resulting in a judgment in favor of plaintiff. Defendant prosecutes this writ, and asks a reversal, because the court below refused to quash and set aside the levy.

Messrs. SKINNER & MANIER, for the plaintiff in error.

Mr. GEORGE EDMONDS, JR., for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This record presents the question, whether a sheriff, to whom a writ of attachment is directed, may go into another county and levy upon property of the defendant in attachment. The third section of the attachment act (R. S. 64) declares, that the officer to whom the writ is directed shall execute it without delay, and if the defendant, or any person for him, shall be in the act of removing any personal property, the officer having the writ is authorized to pursue and take the same in any county in the State, and return it to the county from which

the writ issued. This, then, presents the question whether the defendant in this case was in the act of removing the property seized under the writ at the time the levy was made. The evidence shows that the levy was made on the 4th day of November, 1865, and that the property had been in the county of Knox from the 30th day of the previous October, and, perhaps, some eight days longer. Defendant below swears, in the affidavit which he filed in support of his motion to quash the levy, that he was not in the act of removing the same, at the time, or after, the suing out of the writ.

On the other side it was proved, that defendant in attachment had agreed with two different persons to go into the livery business in Missouri; but no time was fixed for leaving, and he was to return to Carthage before he left. With one of them he agreed to return to Carthage, or meet him at Quincy, when he was ready to go to Missouri, but the time was not fixed. We are clearly of the opinion, that this evidence does not show that plaintiff in error was in the act of removing his property either from the county of Hancock, or from the State. It was in another county, and had been for a number of days, and he denies that he was removing it, nor is there any evidence that he was. The statute evidently contemplates a removal from the county at the time or after the writ is issued, or so recently before that it has not acquired another status, and precluding the belief that the defendant removed it in good faith.

In the case of *Hinman* v. *Rushmore*, 27 Ill. 509, it was held by the court that an attachment must be brought in the county in which the defendant has property, or where he can be served with process, and that there must be service upon him or his property in the county where the suit is commenced, or the court will not acquire jurisdiction of the case; that service upon one or the other in the county to which the writ is returnable, is essential to the jurisdiction of the court. And, in the case of *Fuller* v. *Langford*, 31 Ill. 248, the same rule was announced. So that in this case the court had no jurisdiction, as the property was levied upon in Knox county, and before

plaintiff in error was served with process, there being neither a levy nor service in Hancock county, where the writ was returnable before this levy was made. The evidence failing to show that plaintiff in error was in the act of removing his property, and without a levy made or service on the defendant in attachment in Hancock county before the levy, the court failed to obtain jurisdiction for the purposes of the attachment, by the levy; and the court below should have quashed the levy and discharged the property from the attachment.

It is, however, insisted, that the only means by which the defendant could present this question, was by plea in abatement. If such a plea had been filed under the eighth section, it would only have put in issue the averments in the affidavit as to his intention to remove the property, or that he was removing it from Knox county, and not the power of the sheriff to go into another county with his writ and levy upon property he might there find, and not being removed from his county. It would not have presented the question raised by this motion. It could only be presented as it was in this case.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

DAVID T. LITTLER

v.

THE PEOPLE *ex rel.* WILLIAM HARGADINE.

1. REDEMPTION—*right of—how must be exercised.* The right of redemption is statutory, and must be exercised in pursuance of the statute, otherwise it will be ineffective.

2. SAME—*by a judgment creditor—statute must be complied with.* The statute declares, that after the expiration of twelve months, and at any time before the expiration of fifteen months from the sale of the premises, any judgment creditor may redeem the same in a certain manner therein specified; and a judgment creditor seeking to acquire rights under this statute must comply substantially with all its requirements.

Statement of the case.

3. FORMER DECISIONS. *Phillips* v. *Demoss*, 14 Ill. 410; *Elkin* v. *The People*, 3 Scam. 207; *Robertson* v. *Dennis*, 20 Ill. 313; *McLagan* v. *Brown*, 11 id. 519, considered and explained. In the last case, the doctrine there announced, disapproved.

4. REDEMPTION — *when made by judgment creditor — payment must be made to the sheriff.* The statute requires, that when redemption is sought by a judgment creditor, the redemption money must be paid to the sheriff in whose hands the execution is placed, such sum being held as a bid upon the lands.

5. SAME — *payment to a person other than the sheriff, irregular.* And when, in such case, a judgment creditor paid the redemption money to the master in chancery, who made the sale; *held*, that the redemption was irregular; that payment should have been made to the sheriff, as required by law, and having been made to a person unauthorized to receive it, it could not be ratified by the sheriff, so as to make it effective.

6. SAME — *by a judgment debtor — to whom payment may be made.* But when redemption is sought by a judgment debtor, payment may be made to the master in chancery, who made the sale; or to any other officer of the law, who, by his official bond, is bound for such payment.

7. EXECUTION — *concerning issuance of — after death of judgment debtor — when there is no executor or administrator — quere — whether judgment should be revived.* Under the statute authorizing an execution to issue against the property of a deceased judgment debtor, without reviving the judgment, upon giving notice of the existence of the same, to the executor or administrator, *the inference would seem to be*, that, in case there is no executor or administrator, the judgment must be revived before execution can issue upon it.

APPEAL from the Circuit Court of Logan county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was a petition for a peremptory mandamus, filed in the court below by the relator, William Hargadine, the appellee here, to compel the appellant, David T. Littler, one of the masters in chancery of said court, for Logan county, to execute and deliver to appellee, a deed for certain lands, upon a certificate of purchase for the same, which he, Hargadine, then held, and which he had received from one J. C. Webster, then a master in chancery of said court, and the predecessor of said Littler, at a foreclosure sale of the same, made by the said Webster; said Hargadine claiming, that no redemption for the same had ever been made, and that the period for exercising that right had elapsed.

The record shows, that one Samuel B. Evans, claiming the right to redeem from the sale made to Hargadine, as a judgment creditor, did, within the statutory period allowed for redemption from the sale, cause an execution to be placed in the hands of the sheriff, but instead of depositing with him the redemption money, Evans paid the same to appellant, the master in chancery. And the question here presented is, whether such redemption was a compliance with the requirements of the statute.

The court below granted a peremptory mandamus, whereupon an appeal was taken to this court.

Messrs. WILLIAMS & BURR, for the appellant.

Messrs. PALMER & HAY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only question arising on this record is, as to the regularity and legality of the redemption of the land sold under the decree in chancery, by a master in chancery. The offer to redeem was by a judgment creditor, and made after the expiration of twelve months, and within fifteen months from the sale by the master.

This right of redemption is statutory, and must be exercised in pursuance of the statute, otherwise it will be ineffective. The statute declares, that after the expiration of twelve months, and at any time before the expiration of fifteen months, from the sale, any judgment creditor may redeem the same in the following manner: Such judgment creditor shall sue out an execution upon his judgment, and place the same in the hands of the proper officer to execute the same, and thereupon said officer shall indorse upon the back of said execution a levy upon the lands or tenements which said judgment creditor may wish to redeem; and said judgment creditor shall pay to said officer, into whose hands he shall have placed his execution as aforesaid, the amount of money for which said premises may have been sold, with ten per cent per annum interest thereon,

from the date of such sale for the use of the purchaser thereof, his executors, administrators or assigns, upon payment of which, said officer shall file in the recorder's office of the county in which said lands are situated, a certificate of the redemption thereof, by said judgment creditor under said execution, and shall advertise and offer the same for sale under and by virtue of said execution, in the same manner that other lands are required to be advertised and exposed to sale on execution in other cases. § 14. And by section 15, the judgment creditor, having so redeemed such lands, shall be considered as having bid at such sale the amount of such redemption money so paid by him, and interest thereon from the date of such redemption to the day of sale, etc., providing also for advance bids on that of the redeeming creditor. Scates' Comp. 607, 608.

It is contended by appellant, that it is the policy of the law to favor redemptions, and courts will look to the substance rather than to the form, citing *Philips* v. *Demoss*, 14 Ill. 410; *Elkin* v. *The People*, 3 Scam. 207; *McLagan* v. *Brown*, 11 Ill. 519, and *Robertson* v. *Dennis*, 20 id. 313.

We have examined these cases, and the first cited simply decides, that a party may confess a judgment after failing to redeem in twelve months, for the purpose of enabling such judgment creditor to redeem within fifteen months, and such judgment creditor has a right to redeem under the statute, and this was where a creditor first obtained his judgment before a justice of the peace, had an execution issued which was returned *nulla bona*, although the defendant had sufficient personal property to satisfy the execution, which was known to both the creditor and the constable; and, after such return, the creditor filed a transcript of the judgment in the circuit clerk's office, and sued out an execution thereon, by virtue of which he, as a judgment creditor, redeemed the lands previously sold, this court holding that the constable's false return to the execution did not vitiate the redemption so made.

Elkins' case decides, that the defendant, whose land has been sold on execution, may pay the redemption money to the officer who sold the same, whether in or out of office at the time of

redemption, and it is the duty of the officer to receive it, and his sureties are liable for the money if paid after the expiration of his official term. This has no reference to a redemption by a judgment creditor after the twelve months have expired.

McLagan's case goes to the effect of redeeming, and holds that a judgment creditor who redeems from a prior sale acquires a valid title to the premises redeemed, even though the judgment, by virtue of which he acquired the right to redeem, has been subsequently reversed.

The doctrine of this case has not been acquiesced in by subsequent decisions of this court. *Turney* v. *Turney*, 22 Ill. 253; *Williams* v. *Tatnall*, 29 id. 553.

The case of *Robertson* v. *Dennis* merely reiterates the doctrine in Elkins' case, and, though, as said in Robertson's case, the statute is remedial in its character, and must be construed liberally, so as to advance the remedy, it does not intimate, that, in order to that, its plain provisions must be disregarded.

But the appellant says, even if the law be that the redemption could only be made by the payment of the money to the sheriff, here the deputy sheriff told the judgment creditor, that the master was the proper person to receive the redemption money, and thereupon he paid it to the master, and the sheriff immediately ratified the act, by levying and proceeding to sell, as in the case of redemption. The law knows of no such proceeding. The sheriff was in no position, nor had he any authority, to ratify the unauthorized act of either of these persons. He was the only person competent, under the law, to receive the money, as otherwise he could not recognize it as a bid. He becomes a bidder for the land to the amount he has paid to the sheriff, in whose hands the execution is, and the land must be exposed to sale with this bid upon it, and if any one advances on the bid, he becomes the purchaser.

Nor does a single fact in the record show, that the master acted as the agent of the sheriff in receiving the money. The fact is undeniable, that he received it as master, under a supposed right so to receive it.

Appellant's counsel contend, that the payment of the

redemption money to the master, who made the sale, or to any officer of the law who, by his official bond, is bound for it, is always good payment.

This is true, as the cases cited show, when the person redeeming is the judgment debtor. It is right and just, on paying his debt, his land should be restored to him; but not so with a judgment creditor, seeking to get satisfaction for his debt. He is entitled only to become a competitor with others for the purchase of the land, and then only on the condition, that he places his bid in the hands of the officer who has charge of the execution, and in advance of all others. These are the terms on which the law gives him the privilege. He cannot be a bidder, the execution being in the hands of the sheriff, and the amount of the bid in the hands of a stranger to the proceeding. Nor could the sheriff, as he did not in this case, indorse upon the execution a levy upon this land, which the judgment creditor wished to redeem; nor did he file in the recorder's office of the county a certificate of the redemption thereof by the judgment creditor under his execution; all which the statute requires, but which the sheriff was incapable of doing, for the reason, that the money was not paid to him. The judgment creditor was in no sense in the position the statute requires him to be. As this court said in the case of *Stone* v. *Gardner*, 20 Ill. 309, which was a case where the judgment debtor attempted to redeem by depositing the money with the clerk of the court out of which the execution issued, that officer was not the proper person with whom to deposit money for such purpose. The redemption money could be paid to the deputy sheriff, or to the administrator of a sheriff, if he was dead; or, it might be paid to the purchaser himself, clearly recognizing any serious departure from the statute, remedial as it may be, fatal to the redemption. In this case the judgment creditor might with as much propriety have paid the money to the clerk of the court. It would have been, to the same extent, a bid in his hands, as in the hands of the master.

A point is made by appellee, that the execution, under which

this creditor sought to redeem, was void, it having been issued after the death of the judgment debtor, and without any notice to his executor or administrator.

The answer to this is, as made by appellant, and as the agreed facts show, that the deceased debtor had no executor or administrator.

The statute on this subject is this: "Whenever a judgment has been, or may hereafter be, obtained, in any court of record of this State, against any person or persons who has or shall, after the rendition of said judgment, die, execution may issue against the lands and tenements of the deceased, without first reviving the judgment against their heirs or legal representatives; provided, the plaintiff in the execution or his attorney shall give to the executor or administrator, if there be any, of said deceased person, at least three months' notice in writing of the existence of the judgment before the issuing of the execution; provided, further, that no execution shall issue until after the expiration of twelve months from the death of such deceased person." Scates' Comp. 610.

The inference from this would seem to be, if there is no executor or administrator, then the judgment must be revived against the heirs. To this effect is the case of *Scammon* v. *Swartwout*, 35 Ill. 326.

At the common law, the execution would be void, unless there be an executor or administrator who can be served with notice. There being no such representative of the deceased, it would seem, the judgment should be revived against his heirs before an execution could issue. *Pickett* v. *Hartsock*, 15 Ill. 279; *Brown* v. *Parker*, id. 307. But it is unnecessary to express any opinion on this point, as we hold that the redemption was not regular even if the execution was valid.

On the facts agreed, we are of opinion the judgment creditor, Evans, did not comply with the statute by paying the redemption money to the master in chancery who made the sale, the law requiring it to be paid to the sheriff in whose hands the execution is placed, and is there as a bid on the land. It is but right and just, that a party seeking to acquire rights under

this statute, should take care to comply substantially with all its requirements. There is no hardship in this, nor is there safety without it. The Circuit Court decided correctly in awarding a peremptory mandamus to the master to make a deed for the land to the relator, and the judgment must be affirmed.

Judgment affirmed.

ABEL RIDGELY
v.
JOHN CLODFELTER.

1. SPECIFIC PERFORMANCE. A conveyed to B land of the value of $2,000, in consideration that B should pay the debts of A, amounting to about $600, and, also, convey one-half the land to C, a minor son of A, upon his arriving of age; or pay to C $800 upon C's paying to B one-half of the amount paid by B of A's debts. B paid nearly $600 of A's debts, and sold certain fixtures upon the land, but upon C attaining his majority, B refused to convey half the land or pay the $800, whereupon C filed his bill to compel a specific performance of the contract. *Held,*— That B was under no obligation to convey the land until C had refunded to him one-half of the amount paid upon A's debts, it being optional with B whether he convey the land or pay the stipulated amount.

2. But B, having denied his obligation to make the conveyance, was thereby liable to C for the $800, less a moiety of the debts paid by him; such balance due, in event of B's refusal to convey, being a part of the consideration for the conveyance by A to him.

3. B, having pleaded the statute of frauds as to that portion of the agreement relative to the conveyance of the land, it having been verbal, thereby exercised his option not to make the conveyance, and such denial of the validity of the agreement to convey renders B liable to C for $800, less one-half of the amount paid upon A's debts.

4. In such case it was not error for the court to order an account to be stated between the parties, and render a decree for the balance found to be due; and it appearing by such decree that substantial justice had been done, it will not be disturbed.

APPEAL from the Circuit Court of Lawrence county; the Hon. AARON SHAW, Judge, presiding.

Opinion of the Court.

This was a suit in chancery, instituted in the court below by John Clodfelter against Abel Ridgely, to compel the specific performance of a contract. The opinion of the court contains a sufficient statement of the case.

Mr. J. G. BOWMAN, for the appellant.

Messrs. CANBY & WILSON, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery brought by John Clodfelter against Abel Ridgeley. The record discloses the following facts: In June, 1860, one Kelen Clodfelter, who was the father of the appellee, and father-in-law of the appellant, Ridgely, conveyed to the latter a tract of land worth about $2,500, in consideration of Ridgely's undertaking to pay the debts of Kelen, amounting to about $600, and also to convey one-half the land to John Clodfelter, on his arriving of age, or to pay him $800; the said John, upon this being done, to pay one-half the amount paid by Ridgely upon the debts. John was then eighteen years of age.

In pursuance of his undertaking, Ridgely paid debts of Kelen Clodfelter, amounting to between $500 and $600, and sold the steam works attached to a mill upon the land. When John Clodfelter attained his majority, Ridgely refused to pay him the $800, or to convey one-half the land, and Clodfelter filed this bill. After hearing the case upon the pleadings and proofs, the court below decreed, that the defendant pay the complainant $622.37.

We can see no reason for reversing this decree. It is urged by the counsel for appellant, that he was under no obligation to convey one-half the land, or pay the $800, until the appellee had refunded to him one-half of the amount paid upon Kelen Clodfelter's debts. It is doubtless true, that the appellant was not obliged to convey until this should be done, and it would have been error if the court had so decreed. But the case does not turn upon this question. The substance of the transaction was this: Kelen Clodfelter in conveying his land to his son-

in-law, desired to make some provision for his minor son. He stipulated, that the son-in-law should either convey one-half the land, or pay a certain sum of money to the son on his becoming of age. The option was doubtless with Ridgely, but upon his denying his obligation to convey, he would be liable to account to the complainant for the $800, less a moiety of the debts paid. The payment of the balance due, in the event of his not conveying to John Clodfelter an undivided half of the land, was to be a part of the consideration for the conveyance from John's father. The obligation to convey he seems to have wholly repudiated. He denies in his answer having ever made an agreement to convey one-half the land, and says, that if such agreement was made it was not in writing, and was therefore void. In thus setting up the statute of frauds against that portion of the agreement relating to a conveyance of an undivided half of the land, he may very properly be considered as exercising his option not to perform that portion, and this left the court at liberty, for the purpose of administering complete equity, to state an account between the parties, and decree the payment of the $800, less a moiety of the debts paid. The proof is very clear, that he was either to pay money or convey one-half the land. As to the latter, he says, if such agreement was made it is not binding. The court thereupon decrees, that he shall perform the other branch of his agreement. Substantial justice has been done, and we are not inclined to reverse the decree.

Decree affirmed.

ROBERT THOMPSON *et al.*

v.

CHARLES E. HOVEY.

1. EVIDENCE — *account — credits — admissions.* Where a party files a bill of particulars, embracing many charges, and a credit for a sum as paid, the whole account must be taken together, like an admission of any other kind, and it is for the jury to pass upon it and say what it proves. If the other

party introduces the account, he must introduce both charges and credits for the consideration of the jury. It is error for the court to direct the jury as to the weight of the evidence; it is the province of the jury to determine that question. The court may instruct as to what is testimony, but not what it proves.

APPEAL from the Circuit Court of De Witt county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action of assumpsit brought by Robert Thompson, John M. Major and Charles S. Janes, in the McLean Circuit Court, against Charles E. Hovey. The declaration contained the common counts, to which defendant filed the general issue. The case was subsequently taken by change of venue to the Circuit Court of De Witt county. A trial was had by the court and a jury. The jury found for the defendant, and plaintiffs thereupon entered a motion for a new trial, which was overruled, and judgment rendered on the verdict. Plaintiffs bring the case to this court on appeal, and ask a reversal.

Messrs. WILLIAMS & BURR and E. M. PIERCE, for the appellants.

Mr. W. M. HATCH, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is urged by appellants, that the court below erred, in giving defendant's fifth instruction. It is this:

"The plaintiffs admit a credit of $1,311.77, in the bill of particulars, filed with the declaration herein, and unless the plaintiffs have proved a just claim against the defendant of more than that amount, the jury will find for the defendant."

And, from a careful examination of all the instructions given, we do not see that it was in any wise modified. It appears from the record, that the suit was based upon an account, embracing many items of charges against defendant.

And there was upon it a credit for the sum named in the instruction.

Appellants contend, that the bill of particulars was not in evidence, and therefore the instruction was not based upon the evidence in the case. In the view we take of the case, it does not matter if it had been read as evidence. If offered by appellee as an admission, the charges as well as the credits should have been admitted in evidence. He did not have the right to select the credits as admissions in his favor and reject the debits, any more than he would had it been admissions made in a conversation. In neither case could he select such portions of the admissions as were favorable to him and reject that which was unfavorable. An account of this character is a statement in writing by the plaintiff, and if the other party desires to avail himself of the statement he must permit the whole of it to go to the jury. And when admitted, like all other statements and admissions, it is for the consideration of the jury. When before them, they are the sole judges of what it proves, if any thing. It is not the province of the court to determine the weight proper to be given by the jury to such evidence. The court may instruct what is testimony, but not what it proves. The court, by this instruction, invaded the province of the jury; and we are not prepared to say how largely this misdirection may have contributed to their verdict. The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

St. Louis, Alton and Terre Haute Railroad Company

v.

Charles H. Miller, Administrator, etc.

1. Railroad companies. A recovered a judgment against the Terre Haute, Alton and St. Louis Railroad company, for work and labor performed for it, and subsequently the road was sold, and its purchasers were, by an act of the legislature, passed February, 1861, incorporated as the St. Louis, Alton

and Terre Haute Railroad company, under which they organized, and which act provided, among other things, that, as a condition precedent to its operation, they should pay all unsatisfied judgments which had been recovered against the former company for work and labor done for it. In an action of debt, brought against the St. Louis, Alton and Terre Haute Railroad company, upon this judgment,—*Held*, That the company was liable, it having succeeded, under said act, to all the corporate powers, privileges and franchises of the Terre Haute, Alton and St. Louis Railroad company, and having assumed, in consideration of such grant, to pay and discharge all judgments of such a character, remaining unsatisfied against said company last named.

2. In such case, it was not necessary, that the act should provide a specific remedy in favor of judgment creditors, in the event of the non-payment of their judgments, as, whenever a statute imposes a duty or liability, the common law affords the remedy, either by the action of debt or assumpsit, as the case may be.

3. This act of incorporation constituted an agreement between the State and the St. Louis, Alton and Terre Haute Railroad company, by the making of which the defendant, became liable to pay the judgment in question.

4. ACTION OF DEBT—*proper remedy on judgment record.* The action of debt is the proper remedy on a judgment record.

5. While the State might revoke the grant made to the St. Louis, Alton and Terre Haute Railroad company, because of its exercise of the franchise before condition performed, yet, the act did not design, that judgment creditors should be dependent upon the action of the State in the matter, as such action could not in any way benefit the creditors, or relieve the company from the obligations it had assumed.

6. PLEADING—*declaration in such case—when sufficient.* In such case, no consideration need be averred or proved. It is sufficient, if it appear by proper averment that the judgment was obtained for work and labor performed on the road, and that it has not been satisfied.

7. SAME—*as to surrender of judgment.* Nor was it necessary that there should have been an averment, that the judgment had been surrendered, or transferred to the defendant. This the plaintiff was not bound to do, or offer to do, until an amount sufficient to satisfy the judgment had been tendered. Section 7 of this act, has no application to this case.

8. SAME—*what sufficient allegation that judgment had not been settled.* An averment in the declaration that the judgment sued upon had not been paid, or satisfied, is equivalent to an allegation that it had not been settled or arranged, and under such allegation, the defense was open to prove that it had been settled.

9. SAME—*presumption that a claim is just, which has passed into judgment.* In an action brought upon a judgment, the declaration need not aver that the claim upon which such judgment is founded, was a just one. The original

claim having been sanctioned by the judgment of a court of competent jurisdiction, the presumption is, that it was just.

10. SAME — *of notice of the judgment.* Under the act, an averment of notice to the defendant of the existence of the judgment was not required. It was bound to ascertain for what judgments, and the amount, it had become liable to pay, and to pay them before it took active possession of its franchise.

11. DAMAGES — *when may be computed by the court.* The rule is well settled, that in an action of debt upon a judgment record, for a sum certain, the damages may be computed by the court, without the intervention of a jury.

12. SAME — *in all cases of judgment by default — assessed by the court unless jury is demanded.* Under the act of 1863, in all cases of judgment rendered by default, the court is allowed to hear the evidence and assess the damages, unless a jury is demanded.

APPEAL from the Circuit Court of Montgomery county; the Hon. E. Y. RICE, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. WILEY & PARKER, for the appellants.

Mr. A. N. KINGSBURY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of debt, in the Montgomery Circuit Court, brought to the March Term, 1865, by Charles H. Miller, administrator of the estate of John S. Miller, deceased, against the St. Louis, Alton and Terre Haute Railroad company. The action was debt on a judgment record, by which it appeared that Miller, in his life-time, had recovered a judgment by default against the Terre Haute, Alton and St. Louis Railroad company, at the September Term, 1860, for $2,330 and costs of suit, for work and labor done on the Terre Haute, Alton and St. Louis Railroad, and for that company.

It further appeared that this road was subsequently sold, and its purchasers were, by an act of the legislature passed in February, 1861, incorporated under the name and style of the St. Louis, Alton and Terre Haute Railroad company, and organized

under that act. The act was made a public act, and it provided, among other things, by section 12, as follows:

"All *bona fide* claims or judgments for stock heretofore killed by the Terre Haute, Alton and St. Louis Railroad, and all claims for right of way on that part of the road from Belleville to Illinoistown, and all just dues for work and labor done, and for wood and ties furnished or taken for the said Terre Haute, Alton and St. Louis Railroad company, shall be assumed and paid by the St. Louis, Alton and Terre Haute Railroad company, as a condition precedent to the operation of this act." Private acts of 1861, p. 530.

The declaration alleges that the judgment obtained by the intestate was for work and labor on the Terre Haute, Alton and St. Louis Railroad, and had not been satisfied.

A judgment was rendered by default against appellants, and the court assessed the damages by calculating the interest on the original judgment, and rendered final judgment for $2,332 debt, and $768 damages.

The record is brought here by appeal, and various errors assigned, the most important of which will be noticed.

The appellants insist that the record does not show any legal liability on their part to the plaintiff, and if there was any such liability, he has mistaken his remedy; that the action of debt will not lie. These are the principal points made, and to them appellants' counsel have directed most of their argument.

They insist that appellants are a corporation distinct from the original judgment debtor, composed of different individuals, and acting under a different charter.

This may be so, in some degree, but it is not entirely so. By the charter to appellants they are made the successors, or administrators, so to speak, on the estate of the company which incurred the original liability. They have the same functions, franchises, powers and privileges, and are owners of the whole estate claimed and possessed by their predecessors. The name, only, is changed, and in a very unimportant particular, that is, placing St. Louis first, whereas, it was, under the old corporation, the last.

It was, manifestly, the intention of the legislature, in thus clothing appellants with the property and franchises of the old company, to place them as a corporation in their shoes, on certain conditions, one of which was that they should pay and discharge all unsatisfied judgments recovered against the old company for work and labor performed for it on their railroad. The name of the old company may remain, but that is all. It is stripped of all its powers and franchises and property, to all of which appellants have succeeded, and they have assumed, in consideration of this grant, to become the debtors of such creditors of the old company as had obtained judgments against it for work and labor done upon their road, the benefits of which appellants are in the full and undisturbed enjoyment.

It is urged by appellants, that in the event of non-payment of these judgments, no remedy is given by the act against them, nor is it provided that the claims shall be paid out of any funds to be raised by virtue of the act, nor is there any independent provision that appellants shall pay these claims, but substantially, the provision of the act is this: That the corporation shall not exercise the corporate franchise until such claims are paid.

It is true, the act provides no specific remedy in favor of creditors in case of non-compliance by appellants, nor was it necessary it should so provide. It is a rule universally acknowledged, where a statute imposes a duty or liability, the common law affords the remedy by the ordinary action of debt, when the demand is for a sum certain, or assumpsit, as the case may be. Here the demand was a judgment, and the suit was for its recovery *eo nomine* and *in numero*.

The argument that appellants were not a party to the original judgment, cannot avail against their assumption to pay and satisfy it, in consideration of the rights, privileges and franchises bestowed upon them by the legislature. That was one of the conditions of the consideration as expressed in the act, and the act itself, and the conditions, were based upon the fact, that appellants were not parties to the judgment, but that they would be liable and become bound to pay it, and the act

made them thus liable. That was the policy of the act. Had they been parties to the judgment, it would have been a useless act, to have assumed its payment, for the general law would have compelled them to pay it.

The counsel also say, that the liability of appellants cannot be predicated on any duty arising out of the act, because a legal duty can only be created by a legal obligation growing out of some consideration moving from the plaintiff. In general this may be so, but this case shows an agreement between the legislature of the State and appellants, made at their own solicitation, as we have the right to infer, the legislature acting with an eye to the interests of its people, and the appellants wholly to their own, that on the bestowal on them by the legislature of franchises worth millions, which a defunct corporation had exercised, and in their exercise had incurred debts to the citizens of the State, the appellants would take the place of their predecessors as to these, their just liabilities, and pay and discharge them. This was a fair bargain, and it was competent for the parties to make it, and by making it, the appellants became to all intents and purposes a party defendant in that judgment, and became liable to pay it. The obligation was cast upon the appellants, upon their assuming to exercise the franchises of the old company, to pay this judgment, and it needs no references to authority to show, that the action of debt is the proper remedy on a judgment record.

It may be, as the payment of this judgment was a condition precedent to the operation of the franchises by appellants, and being unpaid, the State might proceed by *quo warranto*, it does not follow, therefore, that the judgment creditor has no remedy, although the act failed to provide one specifically. The State has its remedy against appellants for exercising the franchise before the conditions were performed, by revoking the grant, but it would be but a barren achievement for the creditors, nor was it the design of the act, that they should be dependent on the action of the State, and if the State should act by legal proceedings against the appellants, in what way could that benefit the creditors? It would not tend to the pay-

ment of the claims against them, or relieve them from the obligations they have assumed. To obtain the franchises, they obliged themselves to pay this judgment, and that too before they exercised them. Is the duty and obligation in any respect diminished, because they are operating the road, because they have been for a long time in the full enjoyment of the franchises, and have not paid the judgment? The idea that the State alone can take advantage of the non-payment of this judgment, is therefore not well founded.

On the point, that no consideration moved from the appellee's intestate to the appellants, it is not necessary, in view of the act of the legislature, that there should have been any, in the technical sense of the phrase used. Assuming that appellants are the legal representatives of the defunct corporation, which they are, and so constituted by the act in question, the judgment against it is conclusive evidence of their liability to pay. No consideration, in such case, need be averred or proved. All that is necessary is, that it should appear, by proper averments, that the judgment was obtained for work and labor on the railroad, and, that it has not been satisfied, all which is sufficiently averred in this record.

As to the point, that there has been no surrender or transfer of this judgment by the creditors to the appellants, it is only necessary to say, that admitting appellants are entitled to such surrender or transfer, it no where appears such transfer or surrender has been demanded, nor is one bound to be offered or made, until an amount sufficient to satisfy it shall have been tendered. There is no obligation on the creditor to enter satisfaction of the judgment, make a surrender or transfer of it to appellants, until they have paid the money due by it. Nor does the act so provide. The seventh section has no application to this case. It will be time enough to demand a transfer when appellants pay the money.

Upon the point, that there is no averment, that the judgment has not been settled or arranged, it is sufficient to say, there is an averment in the declaration, that it has not been paid or satisfied, which is an equivalent allegation, that it has

not been settled or arranged. The defense, under the allegation in the declaration, was open to appellants to plead and prove it had been settled and arranged. That is an affirmative fact, which they were bound to establish.

As to the want of an averment that the claim was just, that is not important or necessary. As the original claim had been sanctioned by the judgment of a court of competent jurisdiction, the presumption must obtain that the claim was a just one. The act was not designed to re-open claims that had gone into judgment, or litigate over again their merits, but any open, unadjusted claims for work and labor, or for wood and ties furnished the old corporation, were not to be paid by appellants, until their justice was established. These were to be paid when ascertained to be just, but not so with "judgments had for the same." The judgment established the justness of the claim, not to be again called in question, and is, by the act, conclusive on that point.

That no notice was given to appellants of the existence of this judgment, the act does not require notice should be given. It was the duty of appellants to ascertain and know for what judgments and their amount, they had become liable, and they were bound to pay them, without delay, before they took active possession of their franchises.

The remaining point is, that the court assessed the damages, which, not resting in computation merely, required the intervention of a jury.

The action was debt upon a judgment record for a sum certain. The rule is well settled in all such cases, that the damages may be computed by the court without the intervention of a jury. They are made up of the interest due on the unpaid debt, and rest wholly in computation.

By the act of 1863, in all cases of judgment by default, it is allowed the court to hear the evidence and assess the damages, unless a jury is demanded. Here, there was no necessity for any investigation, other than to compute the interest, and the court on inspection of the record had all the evidence necessary, before it. Laws of 1863, page 47.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

MILTON KIRKPATRICK *et al.*

v.

BENJAMIN F. TAYLOR, Administrator, etc.

1. CONSIDERATION — *want of — what constitutes.* A plea to an action on a promissory note, which sets forth facts showing that it was given with no other consideration than that of natural affection, presents an unquestionable defense, when pleaded as an original want of consideration.

2. SAME — *natural affection sufficient for a deed, but not for an executory contract.* The law is well settled, that natural affection constitutes a valid consideration for a deed, but not for an executory contract.

3. PLEADING — *a plea which states facts, showing a want of consideration — pleaded as a failure of consideration — bad on demurrer — when assigned as such.* On demurrer to a plea in an action on a promissory note, when the plea sets forth, that the note was given by one of the defendants, to secure the support of his mother during her natural life, and for no other consideration and that by a parol agreement the note was to be surrendered at her death, as null and void, and, that she was dead, — *Held:* That such facts present a good defense, when pleaded as a want of consideration.

4. Had the note been originally valid, the parol agreement to surrender it could not destroy its effect, and viewed merely in that respect, and as a plea of failure of consideration, it would be demurrable.

5. That portion of the plea setting up the parol agreement, might be rejected as surplusage, and then the remaining facts in the plea, pleaded as a want, instead of a failure of consideration, would have been good both in form and substance.

6. The plea being objectionable only for surplusage, and as having been drawn as a plea of failure instead of want of consideration, but this latter defect not having been assigned as cause of demurrer, the plea should have been permitted to stand.

APPEAL from the Circuit Court of Bond county.

The opinion states the case.

Mr. S. P. MOORE, for the appellants.

Mr. A. W. METCALF, for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of assumpsit brought by Taylor, as administrator of Elizabeth Kirkpatrick, against the appellants, upon a promissory note, executed by them to Elizabeth Kirkpatrick. The defendants pleaded, that the note was given to secure the support and maintenance of Elizabeth Kirkpatrick, the widowed mother of one of the makers, during her natural life, with an agreement, that it should be surrendered at her death as null and void; that there was no other consideration; and that the said Elizabeth is dead, whereby the consideration of said note has failed. To this plea the plaintiff demurred specially, assigning as causes of demurrer: first, that the plea sets up a verbal contract to vary the terms of a written contract; second, that it purports to be a plea of total failure of consideration, when in substance it is a plea of partial failure; third, that it is uncertain and indefinite. The demurrer was sustained, and on the trial under the general issue, the plaintiff recovered judgment. The facts stated in the plea show an unquestionable defense to the note if they had been pleaded, not as a failure, but as an original want of consideration. The law is well settled, that natural affection does not constitute a valid consideration for a promissory note. See 1 Parsons on Notes, 178 and 197; *Holliday* v. *Atkinson*, 5 B. & C. 501; *Pennington* v. *Gittings*, 2 Gill & J. 208; *Smith* v. *Kittridge*, 21 Vt. 238; *Fink* v. *Cox*, 18 Johns. 145. Although a sufficient consideration for a deed, it is not so as to an executory contract.

But the plea does not rely upon this principle, but seems to treat the note as originally valid, but defeated by virtue of the parol agreement, through the death of Mrs. Kirkpatrick. The effect of the note, if it had been originally valid, could not be destroyed by this parol agreement changing its terms, and viewed merely in reference to that, and as a plea of failure of

consideration, it was undoubtedly demurrable. Nevertheless, that portion of the plea setting up the parol agreement to surrender the note, may be rejected as surplusage, and the plea would still aver facts showing the note was given without consideration and therefore void. If these facts had been pleaded as a want instead of a failure of consideration, the plea would have been good both in form and substance. As it is, the defect is rather in the form than in the substance. The demurrer was special, alleging only the three grounds above stated. Inasmuch as the plea averred facts which amounted to a defense, and was only objectionable for its surplusage, and for having been drawn as a plea of failure instead of want of consideration, and as this is not set down as a cause of demurrer, the demurrer should have been overruled.

Judgment reversed.

TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY

v.

THE PRESIDENT AND TRUSTEES OF THE TOWN OF CHENOA.

1. CORPORATION — *municipal — charter.* Where an act of the general assembly provides that all acts performed for the purpose of incorporating a town shall be valid; and that all ordinances which it may have adopted, not repugnant to the Constitution of this State or the United States, shall be binding, such legislation recognizes the existence of the corporate body, and cures any irregularities that may have occurred in its organization.

2. SAME — *their powers.* By the act of February 10, 1849, it is declared, that the corporate authorities of all towns and cities incorporated under the general law or under special charters, shall have the same powers as are conferred on the cities of Quincy and Springfield, by their charters and amendments thereto. The charter of Springfield confers power to open, widen, establish, grade or otherwise improve and keep in repair, streets, avenues, lanes and alleys; and to pass all ordinances necessary to carry into effect the powers conferred by the charter. *Held*, that this conferred upon the town of Chenoa, power to adopt an ordinance punishing by fine, any person who might obstruct a public street within its limits.

Statement of the case.

3. SAME—*ordinance—violation of.* Where an ordinance prohibited a railway company from obstructing a public street, by permitting their cars to remain stationary therein for more than fifteen minutes, but referred to another ordinance which, as copied in the record, bore date subsequently to the first, *Held*, that the town failed to establish any ground for a recovery.

4. PRACTICE. Where a record comes to this court properly certified, it must be presumed to be correct, and the case will be tried upon it thus certified. If, however, either party may wish to have it amended, by the insertion of some portion omitted by the clerk, or which that officer has copied incorrectly into the record, he should suggest a diminution of the record, and apply for a writ of *certiorari* to have the omitted portion returned, and thus have the transcript corrected.

5. SAME—*fine for breach of ordinance.* Under the provisions of the charters of Quincy and Springfield, any incorporated town may impose a fine of more than five dollars, but the Constitution limits the jurisdiction of justices of the peace for fines and penalties to one hundred dollars.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action of debt, brought by the president and trustees of the town of Chenoa, before a justice of the peace, against the Toledo, Peoria and Warsaw Railroad company, for the recovery of a penalty for a breach of an ordinance of the town. Plaintiffs recovered a judgment on a trial before the justice of the peace. Defendant removed the case to the Circuit Court of McLean county, and a trial was there had by the court, a jury having been waived by the parties.

On the trial, plaintiff proved that defendants obstructed one of the public streets in the town, by permitting their cars to remain on the track crossing the street, from the 25th till the 26th of January, 1866. The testimony shows that this street was one of the principal crossings on the east side of the town.

Plaintiff introduced an act of the general assembly legalizing the acts of the town in organizing the corporation; also, an ordinance prohibiting the obstruction of any public street, alley or crossing, under a penalty of five dollars for each hour such obstruction shall remain. This ordinance bears date the 11th of April, 1866. Also, an ordinance which declares that whenever railroad cars remain in or upon the crossing of the several

streets of the town over the space of fifteen minutes, so as to obstruct the crossing or travel, the same shall be considered a violation of article 14 of town ordinances, in relation to the obstruction of streets. This ordinance fixes no penalty, and bears date the 20th of October, 1865. The court found for plaintiff ninety-eight dollars, for the time the street was obstructed. Defendant entered a motion for a new trial, which was overruled, and judgment rendered according to the finding; to reverse which defendant appeals to this court.

Messrs. INGERSOLL & PUTERBAUGH, for the appellant.

Mr. O. T. REEVES, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is insisted that there is no evidence in the record that the town of Chenoa was ever incorporated; and hence the president and trustees had no power to pass the ordinance, for the violation of which this suit was brought. By an act of the general assembly, adopted on the 16th of February, 1865 (Private Laws, vol. 2, p. 430), it is declared that all of the acts and proceedings, done for the purpose of incorporating the town of Chenoa, be legal and valid; and all ordinances passed by the president and trustees of the town, not inconsistent with the Constitution of this State, or that of the United States, are also declared to be legal and binding. The act also authorizes the president and trustees to fix the boundaries of the town, so as to include any tract of land laid out into town lots. This act fully recognizes the previous organization of the incorporation, and cures all defects that may have occurred in its organization.

By the act of February 10, 1849, section 4 (Scates' Comp. 200), it is declared that the corporate authorities of all towns and cities, incorporated under chapter 25, of the Revised Statutes of 1845, or under any special act, shall have power to pass all ordinances and by-laws, and possess all the powers authorized by the laws and amendatory acts incorporating the cities

of Quincy or Springfield. This, then, conferred the power upon the corporate authorities to adopt any ordinance which was authorized by either of those charters.

The general assembly, at its special session in 1840 (Sess. Laws, p. 9), conferred on the city of Springfield, by section nine of article four, the power to open, widen, extend, establish, grade or otherwise improve and keep in repair, streets, avenues, lanes and alleys. The second section of article eight, confers the power, for the purpose of keeping the streets, avenues, lanes and alleys in repair, to compel persons therein enumerated to labor on the same. Section thirty-six of article five, confers power to pass all ordinances necessary for carrying into effect the powers granted by the charter. It would seem that these provisions confer ample power upon the corporate authorities of this town, to punish by fine any person who may obstruct a public street.

The offense is charged to have been committed on the 23d day of January, 1866, and the suit was brought to recover the penalty on the seventh day of the following February. The ordinance declaring it to be an offense for a railroad company to permit their trains or cars to stand upon, and obstruct, any street in the town longer than fifteen minutes, was adopted on the 20th of October, 1865, as appears from the transcript filed in this case. But it prescribes no penalty for a violation of its provisions; it, however, refers to article fourteen of the town ordinances, for the penalty.

When, however, we examine article fourteen of the town ordinances, as copied into the transcript of the record, we find it bears date the 11th day of April, 1866, nearly three months after the offense is charged to have been committed. And we find that it is recited in the caption which precedes the ordinance, that it was adopted by the board on the 11th day of April, 1866. And the town clerk certifies at the end of the ordinance, that he posted three copies on that day. It is suggested by counsel, that this is a mistake of the clerk in copying the ordinance into the record. It is rather remarkable, that the clerk should have made the same mistake in both places.

If the ordinance was adopted in October, 1865, of which we have no evidence in this record, it may be, that the corporation clerk made the mistake in furnishing the copy to be incorporated into the bill of exceptions. If the clerk of the Circuit Court made the mistake, appellee should have suggested a diminution of the record, and obtained a writ of *certiorari* to correct it, before joining in error. We are bound to try the case on the record as it is before us, and as it appears when the joinder in error is filed. There was then no evidence before the court so far as this record discloses, that there was any penalty, or if so, what it was, when this obstruction took place.

It was held, in the case of *Hamilton* v. *The Town of Carthage*, 24 Ill. 22, that a town incorporated under the general law, with the powers conferred by the charter of the city of Quincy or Springfield, may impose a fine for a breach of their ordinances, exceeding five dollars. That the power to impose penalties and fines, was not limited in amount by those charters. It was, however, held, that the tenth section of the tenth article of our Constitution, prevented justices of the peace from trying cases involving fines to a greater amount than $100.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

THE PEOPLE *ex rel.* SILAS LIVERGOOD
v.
SAMUEL F. GREER, County Judge of Macon County.

1. STATUTE—*amendment of—how construed.* In construing a statute, it is a well settled rule, that the old law must be considered; the mischiefs, inconveniences or hardships produced by it, and then, the remedy proposed by the amendatory law.

2. SAME—*construction of—act of* 1845 *not applicable to actions for torts.* The act of 1845, relating to insolvent debtors, was only applicable to that class of debtors, becoming so by contracts into which they may have entered, and not to arrests on *mesne*, or final process for torts.

3. SAME — *under amended act,* 1845 — *imprisonment — how effected.* Under the amendatory act of 1845, tort feasors could be imprisoned, if the plaintiff in the action was willing to, and did advance, weekly, the jail charges.

4. SAME — *right of insolvent debtor — extended to what class of tort feasors by the act of* 1861. By the act of 1861, the right to be dealt with as an insolvent debtor, was extended to all tort feasors, except those whose torts originated in malice, or where malice was the *gist* of the action.

THIS was an application for a peremptory mandamus against Samuel F. Greer, county judge of Macon county. The agreed facts in the case are as follows: In December, 1866, a *ca. sa.* was issued out of the Circuit Court of Macon county, upon a judgment before then recovered in said Circuit Court, against the relator, and in favor of one Peter Kob, in an action on the case, for an alleged seduction of Kob's daughter.

That by virtue of said writ of *ca. sa.* the relator was arrested, and, at his request, was taken by the sheriff before the defendant, the county judge of said Macon county. That thereupon, said relator filed his schedule, verified by affidavit, and moved said court to appoint an assignee and discharge him from custody; the proceedings being based upon the amendatory act of 1861, entitled, "Insolvent debtors." The court, upon consideration of the motion, denied the same, whereupon the relator, by his counsel, prayed an appeal to the Circuit Court of Macon county, which was also refused, and the relator remanded to custody.

Messrs. NELSON & ROBY and J. H. MATHENY, for the relator.

Mr. A. J. GALLAGHER, for the defendant.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The case presented by this record involves the construction of the act of 1861, amendatory of chapter 52 of the Revised Statutes, entitled "Insolvent debtors."

This amendatory act provides that in all cases where any person is or shall be imprisoned or arrested by virtue of final process issued upon a judgment rendered in an action of tres-

pass, or trespass on the case, when said action was founded on or grew out of a contract express or implied, and when malice was not the *gist* of said action, such person shall be entitled to release his or her body from such arrest or imprisonment, by scheduling and delivering up his or her property for the benefit of his or her creditors, including the judgment on which he or she is held, as aforesaid, in manner and pursuant to the provisions of chapter 52 of the Revised Statutes of 1845, entitled "Insolvent debtors." Laws of 1861, p. 178.

In construing a statute, it is a well settled rule that the old law must be considered, the mischiefs or inconveniencies or hardships produced by it, and then the remedy proposed by the new law or statute.

Under the act of 1845, debtors only could be discharged from imprisonment in the mode therein prescribed; that is, debtors becoming so by contracts into which they may have entered. This law was always held as solely and strictly applicable to that class of debtors; it had no application to arrests on *mesne* or final process for torts. *The People ex rel. Brennan* v. *Cotton*, 14 Ill. 414. Tort feasors could be imprisoned and confined in jail if the plaintiff in the action was willing to advance, and did advance, weekly, the jail charges. Amendatory act of 1845, Scates' Comp. 587.

This power over a wrong-doer was very great, and if a wealthy or revengeful man was the prosecutor, he had the right to incarcerate his victim, when he might have done the wrong complained of from mere inadvertence, and with no bad design. This being so, it was deemed proper by the legislature to place such delinquents on the same footing as debtors by contract, except in cases where the tort was malicious. A mere wrong, the legislature thought, should be atoned for in the same mode as a debt, and visited with a penalty no severer. Accordingly, to carry out this view, the act of 1861 was passed, by which the right to schedule and become as an insolvent debtor, was extended to all tort feasors, except those whose torts originated in malice, or where malice was the gist of the action. This, we think, was the intention of the legislature, expressed not in

the clearest language, but yet so clearly as to make the intention unmistakable.

The wrong for which the judgment was rendered against the relator, did not originate in malice; malice was not the gist of the action for which the recovery was had against him, consequently, under the act of 1861, he had the right to be dealt with as an insolvent debtor. A peremptory *mandamus* will issue to the defendant, the county judge of Macon county, as prayed for in the petition.

Mandamus awarded.

THOMAS FELL, impleaded, etc.,

v.

THE BOARD OF SUPERVISORS OF MCLEAN COUNTY.

STATUTES — *act of* 1861 — *concerning tax for equipment of volunteers — construction of.* Under the act of 1861, "to encourage the formation and equipment of volunteers," the county of McLean assessed a special tax, and its board of supervisors appointed a disbursing agent, as required by the law, and also made an order, directing town collectors to pay over to him this war tax, which was done, such agent receiving and disbursing the fund. In an action against the county treasurer on his bond, to recover two per cent of this tax which he had retained as commissions, — *Held*, that the tax thus assessed was a county tax, and as such, should have been paid to the county treasurer, and not to the agent, as ordered by the supervisors, they having no legal power to make such order. That it must be assumed, that the treasurer would have received and disbursed the fund if he had been permitted, and having the legal right so to do, he must be considered as having done it, and entitled to his commissions therefor as provided by law.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action of debt, instituted in the court below, by the board of supervisors of McLean county, against Thomas Fell and his sureties, on his bond as treasurer of said county, to recover a certain sum of money which he had retained as commissions on a war fund raised by a special tax, during the

years 1861, 1862 and 1863, under the act of 1861, entitled an act, "To encourage the formation and equipment of volunteer companies."

The further facts in the case are fully stated in the opinion of the court.

Messrs. WILLIAMS & BURR and Mr. W. M. HATCH, for the appellant.

Mr. W. H. HANNA, for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Under the act of the legislature of 1861, entitled "An act to encourage the formation and equipment of volunteer companies," the county of McLean assessed what was called a special war fund tax, during the years 1862, 1863 and 1864. The board of supervisors appointed a disbursing agent, as required by the law, and made an order authorizing the township collectors to pay over the special tax, when collected, directly to this agent. This was done, and this war tax never went into the hands of the county treasurer. Thomas Fell was, during these three years, the county treasurer, and on settling with the board of supervisors, on his retirement from office, he retained two per cent as his commissions on this war fund tax. Suit was brought against him on his bond, and the Circuit Court below, allowed him one per cent. Fell appealed, and the only question presented relates to these commissions.

However technical the claim may appear, we are constrained to say that, under the letter of the law, the appellant is entitled to two per cent commissions. The board of supervisors had no legal power to direct the town collectors to pay this tax directly to the disbursing agent. Section 3, article 17 of the township organization law, Purple's Statutes, page 1148, provides that "it shall be the duty of the county treasurer to receive all moneys belonging to the county from whatever source they may be derived, and all moneys belonging to the

State which by law are directed to be paid to him, and to pay and apply such moneys in the manner required by law." Section 6, article 20 of the same act, provides that "the warrant directed to the collector of a town, shall direct the collector, out of the moneys to be collected, after deducting the compensation to which he may legally be entitled, to pay over to the commissioners of highways the amount of tax collected for the support of highways and bridges, and to the supervisors of the town all other moneys which shall have been collected therein to defray any other town expenses; to the township treasurers the school fund tax, and to the county treasurer the State and county tax collected by them." It is not denied that this war tax was a county tax, and it is plain from the foregoing provisions that it should have been paid over to the county treasurer, and that the board of supervisors had no authority to give it another direction.

The county treasurer is entitled to a commission of one per cent for receiving, and one per cent for paying out the county tax. Laws of 1861, p. 240, § 10. We presume the judgment of the Circuit Court, allowing one per cent, was rendered upon the theory, that as the treasurer legally had the right to receive this money, he should be considered as having in fact received it, and as entitled to his commissions therefor; but inasmuch as, even if he had received it, he might never have paid it out, or might only have paid it to his successor in office, in which last event he would not have been entitled to commissions, it is not certain he would have earned his one per cent for disbursing, or, that he was prevented from earning it by the unauthorized act of the board of supervisors. We do not think, however, this view is tenable. The treasurer was under heavy bonds to perform properly the duties of his office. If he had failed to pay over the money, as required, he and his sureties would have been liable on his bond. It is fairly to be inferred from the record, that the money would have been required by the disbursing agent while Fell was in office, and that none would have remained in his hands for his successor. It is reasonable to presume he would have performed the duties of

his office. In the case of the *People ex rel. Ballou* v. *Dubois*, 23 Ill. 547, this court decided, that although the legislature had relieved a circuit judge of the performance of his duties by taking from him his judicial territory, they could not deprive him of his right to his salary during his term of office, and a mandamus was issued to compel its payment. The two cases are much alike in principle. It was assumed in that case, as we must assume in this, that the officer would have performed his official duties if he had been permitted. We must reverse and remand this case, with directions to allow the two per cent commissions.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES CLEMENS, JR.,

v.

GEORGE W. SMITH, State Treasurer, and O. H. MINER, Auditor of Public Accounts.

1. PAYMENT — *must be made to the proper person.* A, the owner of certain bonds of this State, applied to the State Treasurer for payment of the accrued interest thereon, which was refused, for the reason that said interest had been paid to one B, who had presented to the treasurer a power of attorney, properly acknowledged, and purporting to have been executed by A, authorizing such payment to be made to B. On petition by A for a peremptory *mandamus* to compel the treasurer to pay said interest to him, — *Held:* It appearing by the evidence that such power of attorney was never executed by A, and that he is the true owner of the bonds, payment of the interest on them by the treasurer to another and different person does not discharge the State.

2. If such power of attorney was not a forged one, and made by a person bearing the same name as A, but not the identical A to whom the bonds belonged, payment to such person simulating the true owner, is no payment.

3. In such case the treasurer took the risk of the identity of A, and hrough his negligence A's identity was not established, and payment was

made to the wrong person, it is no discharge of the State to the real party entitled to it.

4. Where a custodian of money pays it out to the wrong person, of whose identity he is not assured, such payment, though made to one simulating the real party, is no bar to recovery by the latter.

5. The State Auditor being a party to the application, through whom alone the treasurer can pay out money, a peremptory *mandamus* will issue to the auditor, requiring him to issue his warrant upon the treasurer for the amount of interest due.

THIS was an application to this court for a peremptory writ of *mandamus*, on the relation of James Clemens, Jr., against George W. Smith, State treasurer, and O. H. Miner, auditor of public accounts. The facts in the case are fully stated in the opinion.

Mr. JAMES C. CONKLING, for the relator.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is a petition for a mandamus to compel the State treasurer to pay to the relator, James Clemens, Jr., of St. Louis, the interest due upon certain bonds of this State, held and owned by Clemens.

The petitioner states, that he is a resident of St. Louis, in the State of Missouri, and the owner of a bond of this State, numbered 4983, bearing date July 1, 1847, and payable to petitioner in twenty-three years from date, for the sum of $1,085.76, with interest at the rate of six per cent per annum, payable in New York, on the first day of January and July of each year; that he is also the owner and holder of a bond of the State, numbered 2150, payable to him in thirty years from July 1, 1847, for the sum of $500, bearing interest at the rate of six per cent per annum from July 1, 1857.

He further states, that on the 23d day of August, 1856, the sum of $192.16, was paid to him for interest on the first mentioned bond, and that is all that he has ever received as interest on either of these bonds.

He further states, that on the 12th of February, 1867, he applied by his attorney to the State treasurer, and demanded of him, the balance due him for interest on these bonds, which the treasurer refused to pay.

The demand on the treasurer is fully proved. The treasurer waives the alternative writ, and alleges, in justification of his refusal, that the books and files of his office show, that there was paid to S. Halliday, an agent of the United States Express company, on the fifteenth of December, 1862, all the interest which had accrued on these bonds, from 1856 up to July 1862, amounting to $540.84, the first payment being of the interest due January 1, 1857. That Halliday presented a power of attorney to collect this interest, purporting to have been executed by James Clemens, Jr., of the city of Philadelphia, Pa., on the 8th of December, 1862, and acknowledged before John B. Thayer, a commissioner of the State of Illinois, for that city. We are called upon to say, whether this payment discharged the State.

It is in evidence, that these bonds, described in the petition, are now, and have always been since their issue, in the possession of James Clemens, Jr., of St. Louis, Missouri, that he is an old resident of that city, and he testifies he was not in Philadelphia on the day the power of attorney bears date, and had not been in Philadelphia in the month of December, for the past thirty years, and that on the 8th day of December, 1862, he was in his office in St. Louis, and on that day he drew a check on a banking house in St. Louis, which check is shown, and bears the date December 8, 1862. The petitioner, in his affidavit, states, he never made a demand for the interest, and never authorized any person to demand it.

The affidavit of James B. Clemens shows, that he is a clerk in the office of the petitioner, and was such clerk in 1862, and that, on the 8th day of December, of that year, the petitioner was in his office in the city of St. Louis, and drew the check before spoken of, which the petitioner signed.

Another clerk in petitioner's office in St. Louis, Russel H. Mather, testifies, that he entered the office as clerk in July,

1862, and remained as such until the first day of March, 1864, and during that time the petitioner was not absent for one day in the month of December; that this appears from entries in the books of the office made by petitioner, and one entry made by him on the 8th day of December, 1869.

Mr. Edwards testifies, that he has long known the petitioner and is familiar with his handwriting, and that the name, "James Clemens, Jr.," signed to the power of attorney, executed in Philadelphia, is not the handwriting of James Clemens, Jr., of St. Louis.

There is no question made, that James Clemens, Jr., of St. Louis, is not the true owner of these bonds. This being so, the payment of the interest on them to another and different person, does not discharge the State, on the authority of the case of *Wilson, Admr.*, v. *Alexander*, 3 Scam. 392. If the power of attorney was not forged, but made by a person whose real name was James Clemens, Jr., but not the identical James Clemens, Jr., to whom the bonds belonged, then payment of the interest to this person, simulating the true owner, would be no payment. The treasurer took the risk of the identity of the payee, and if, by his negligence in not assuring himself of the identity, payment has been made to the wrong person, the State remains liable to pay the interest to the real party entitled to it. It is not usual, that a custodian of money, who knows his duty, and wishes to perform it, pays money to one of whose identity he is not entirely satisfied. Should he pay to one simulating the real party, it will be no bar to a recovery by the latter. *Graves* v. *American Exchange Bank*, 17 N. Y. 205.

These bonds being the property of the relator, his demand for the interest due upon them cannot be refused by reason of any thing shown.

As the auditor has become a party to this application, through whom alone the treasurer can pay out money from the treasury, a peremptory mandamus will issue to the auditor requiring him to issue a warrant on the treasury for the sum of $540.84, being the interest due on the bonds described in the

petition, from the 23d day of August, 1856, to the 1st day of July, 1862, and on presenting the same at the treasury the treasurer will pay that amount to the petitioner or his authorized agent.

Mandamus awarded.

JOHN H. GASS *et al*
v.
MILTON W. HOWARD

1. CONTINUANCE — *affidavit for.* Where a cause has been pending in a court in this State for eighteen months, and a witness resides in another State when the suit is brought, the party desiring to use his evidence should, without unreasonable delay, proceed to take his deposition. He has no right to rely upon his promise to attend at the trial, and if he does it is at his own peril.

2. SAME — *diligence.* Where a suit had been brought in February, and a witness resided at the time in the State of Indiana, and so continued for some fifteen months and no efforts appear to have been made to take his deposition, and an affidavit stating that the witness had left for Oregon by way of the plains some four months previous to the application for a continuance, and the affidavit states that the party had no knowledge of his intention of leaving until he had gone, but that witness promises to return soon after reaching Oregon, and if he should not the party expects to take his deposition before the next term of court; and the affidavit showed no other diligence,—*held* that such an affidavit is not sufficient to entitle the party to a continuance.

APPEAL from the Circuit Court of Vermillion county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was an action of assumpsit, commenced on the 21st of February, 1865, by Milton W. Howard, in the Vermillion Circuit Court, against John H. Gass and Harvey Sandusky. The declaration contained a special count upon the assignment of a note, with the common counts. At the return term, the cause was continued on the application of the defendants, based on an affidavit. The general issue was filed together with a number of special pleas, and after demurrers to pleas and replica-

tions were disposed of at the next term, issues were formed and the cause continued.

At the September Term, 1865, the cause was submitted to the court for trial without the intervention of a jury, by consent of the parties. After hearing the evidence the court took the case under advisement; and at the next March Term, set aside the order submitting the cause and continued it until the next term.

At the succeeding September Term, defendants filed an affidavit made by Goss, in which he states that one Hardrick was a material witness on the trial of the cause; that he had formerly resided in Indiana, and had, sometime in the month of May or June, 1866, gone over the plains to Oregon, of which he had no intimation until the witness was on his way, and that defendants were thus prevented from taking his deposition. But the witness had promised to return soon after he had reached Oregon, and if he should not, he expected to take his deposition before the next term of court.

The court overruled the motion for a continuance, and defendants excepted.

The cause was then tried by the court and a jury, when a verdict was found in favor of plaintiff for $483.97, whereupon defendants entered a motion for a new trial, which was overruled, and judgment rendered on the verdict; to reverse which this appeal is prosecuted.

Mr. M. D. HAWES, for the appellants.

Mr. O. L. DAVIS, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

The refusal of the court below to grant a continuance to appellants, is urged as a ground of reversal. The suit was commenced in February, to the April Term, 1865. At that time the cause was continued upon the account of Hardrick's absence

as a witness. At the September Term, 1860, the cause was submitted to the court for trial, without a jury, by consent of parties, and the cause was taken under advisement until the next February Term, when the order of the previous term submitting the cause for trial was set aside, and the case reinstated on the docket for trial, and a continuance was entered. And at the September Term, 1866, the motion for a new trial was entered and overruled.

We regard the affidavit as fatally defective, in not showing that appellants had used reasonable diligence. It is stated in the affidavit that the witness resided in the State of Indiana previous to his departure to Oregon, and after the suit was commenced. This being so, and he being beyond the process of our courts, appellants had no right to rely upon his attendance as a witness; they knew that he could not be compelled to attend. They also knew, that, being a non-resident, they had the right to take his deposition. And they have failed to show, by the affidavit, any reason why they had not procured it at some time within the year and a half which had elapsed after the commencement of the suit and before the trial. The affidavit shows that the witness did not leave for Oregon for some fifteen months after the suit was brought, and about five months before the term at which the continuance was asked. The only excuse made for a failure to do so, is, that the witness had left before they were aware of the fact, and they were then prevented from taking his deposition, as he was on the plains. This is, no doubt, true, but it does not rebut the presumption that they had previously ample time and opportunity to have done so, and by slight diligence could have had his testimony. There was no error in overruling the motion for a new trial, and the judgment of the court below must be affirmed.

Judgment affirmed.

JOHN GUEDEL

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INDICTMENT—*for murder—charging the offense—and of variance.* When an indictment for murder charged the offense as having been committed by shooting from a gun by means of powder and shot, proof, that the murder was committed by striking the deceased with a gun upon the head, is inadmissible.

2. SAME—*the precise nature of the charge must be stated.* The law requires, that a prisoner on trial for murder, shall be fully informed by the indictment, of the precise nature of the charge against him.

3. SAME—*mode in which offense was committed—essential part of.* The mode in which the offense was committed, is an essential part of the indictment; and killing by shooting, and killing by beating upon the head with a gun, are modes of causing death so essentially unlike, that proof of the one mode would be inadmissible under an indictment charging the other.

4. SAME—*when no legal jeopardy.* Where a person was indicted for a murder, committed by shooting with powder and shot from a gun, and was acquitted, and was afterward indicted for the same murder, and convicted, and in such second indictment the offense was alleged to have been done by beating upon the head with a gun,—*Held*, that the two indictments stated different offenses, and that the acquittal on the first one, was no bar to the second, the prisoner never having been in legal jeopardy.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The facts in this case are fully stated in the opinion of the court.

Mr. G. B. BURNETT, for the plaintiff in error.

Mr J. B. HAY, for the people.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

At the May Term, 1866, of the Madison County Circuit Court, John Guedel, the plaintiff in error, was indicted for the murder of Adam Zimmerman. The indictment charged the killing to have been done by striking the deceased upon the

head with a gun. The defendant pleaded *autre fois acquit.* The plea set forth that at the October Term, 1864, of the same court, the defendant was indicted for the murder of said Zimmerman, duly tried by a jury and acquitted. The plea gives the former indictment, which avers the killing to have been done by shooting with a gun, charged with gunpowder and leaden shot. To this plea there was a replication, admitting the acquittal upon the former indictment, and that the said Adam Zimmerman in the present indictment mentioned, is the same Adam Zimmerman mentioned in the former, but averring that "the said felony and murder mentioned in the former indictment are not the same felony and murder mentioned in the present indictment, and that the said Adam Zimmerman was killed and murdered by the said John Guedel in the manner and by the means set forth in the present indictment, and not in the manner and by the means alleged in the said former indictment."

To this replication the plaintiff in error demurred. The demurrer was overruled, and on the trial which followed, the jury found the defendant guilty. No bill of exceptions was taken, and the only question made in this court is, as to the correctness of the decision in overruling the demurrer.

The first question to be determined is, whether the evidence upon which the verdict must have been found under the present indictment, would have been admissible under the former; that is to say, whether, under an indictment for murder committed by shooting from a gun by means of powder and shot, the people could be permitted to prove a murder committed by striking the deceased with a gun upon the head.

The rule in regard to questions of this character is briefly stated by Greenleaf, with his customary precision, as follows: "An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description. 1 Greenl. § 65. In his third volume, section 140, he again says: "It is sufficient if the proof agree with the allegation in its substance and generic character, without precise conformity in every particular.

Thus, if the allegation be, that the death was caused by stabbing with a dagger, and the proof, etc., of killing by any other sharp instrument; or if it be alleged, that the death was caused by a blow with a club, or by a particular kind of poison, or by a particular manner of suffocation, and the proof be of killing by a blow given with a stone or any other substance, or by a different kind of poison, or another manner of suffocation, it is sufficient; for, as Lord COKE observes, the evidence agrees with the effect of the indictment, and so the variance from the circumstance is not material. But if the evidence be of death in a manner essentially different from that which is alleged, as if the allegation be of stabbing or shooting, and the evidence be of death by poisoning, or the allegation be of death by blows inflicted by the prisoner, and the proof be, that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported." We have consulted many of the text writers upon this subject, and the same rule, in substance, with similar illustrations, is laid down by them all. The rule rests upon various adjudged cases. Thus, where the indictment alleged, that the prisoner struck the deceased with a piece of brick, and thereby gave him a mortal wound, and it appeared, that the blow was given, not with a piece of brick, but with the fist, and that the deceased fell from the blow upon a piece of brick, and that the fall caused his death, the judges, on a case reserved, were unanimously of opinion, that the means of death were not truly stated. *Rex* v. *Kelly*, 1 Moody C. C. 113. The authority of this decision was afterward recognized in *Rex* v. *Thompson*, id. 139. So where an indictment charged a shooting with a pistol loaded with gunpowder and a leaden bullet, and it appeared, that there was no bullet in the room where the act was done, and no bullet in the wound, and it was proved, that the wound might have been caused by the wadding, it was held, that the indictment was not proved. *Rex* v. *Hughes*, 5 C. & P. 126. This case appears to us to push the doctrine of variance to its extreme verge, and probably we might not be disposed to follow it to its full extent, but we cite it as illustrating the principle which we feel obliged to apply to the case

before us. See also Martin's case, 5 C. & P. 128. In *The People* v. *Colt*, 3 Hill, N. Y., a more liberal rule was applied, and it was held, that under an indictment for murder by cutting with a hatchet, or by striking and cutting with an instrument unknown, evidence might be given of shooting with a pistol. This decision, however, is a departure from the current of authorities. So far as our researches extend, it stands alone.

In the peculiar position of the present case this doctrine of variance bears unfavorably upon the prisoner; but it has its origin in that tenderness of the law for human life which requires, that a prisoner on trial for murder shall be fully informed by the indictment of the precise nature of the charge he is called to meet, and we do not deem ourselves at liberty to depart from the established precedents. We must hold, that homicide by shooting and homicide by beating upon the head with a gun held in the hands, are modes of causing death so essentially unlike, that proof of one mode would be inadmissible under an indictment charging the other.

But, it is urged by the counsel for the plaintiff in error, that admitting this, nevertheless the plaintiff in error has been once indicted for the murder of Adam Zimmerman and acquitted, and that he cannot be placed in jeopardy a second time for the same offense. The answer to this is, that, technically, and in the eye of the law, the offenses described in the two indictments are not the same. The mode in which the killing was accomplished is an essential part of the indictment, and if two indictments allege modes of killing so substantially unlike that the evidence necessary to sustain the one would not be admissible under the other, then they are not indictments for the same offense, in a legal sense, although they may relate to the homicide of the same person. The rule is laid down by Bishop in the first volume of his Criminal Law, section 885, third edition, as follows: "The jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both;" and, in the next section, he says: "The test is, whether, if what is set out in the second indictment had been proved at the trial under the first, there could have

legally been a conviction; when there could have been, the second cannot be maintained; when there could not, it can be." In support of this position, the author cites, *Hite* v. *The State*, 9 Yerg. 357; *People* v. *Warren*, 1 Park. 338; *People* v. *Allen*, id. 445; *Durham* v. *The People*, 4 Scam. 172; *Commonwealth* v. *Curtis*, Thatcher's Crim. Cas. 202. Greenleaf, in his third volume, section 36, says: "The former judgment, in these cases, is pleaded, with an averment that the offense charged in both indictments is the same; and the identity of the offense, which may be shown by parol evidence, is to be proved by the prisoner. This may be generally done by producing the record, and showing, that the same evidence which is necessary to support the second indictment would have been admissible, and sufficient to procure a legal conviction upon the first." He cites Arch. Cr. Pl. 87; *Rex* v. *Emden*, 9 East, 437; *Rex* v. *Clark*, 1 B. and Bing. 473; *Rex* v. *Taylor*, 3 B. & C. 502; 1 Ross on Crimes, 832; *Commonwealth* v. *Roby*, 12 Pick. 496; *Rex* v. *Vandercomb*, 2 Leach C. C. 768.

The last cited case is a leading one upon this subject. Mr. Justice BULLER delivered the resolution of the judges, and after referring to 2 Hawk. P. C., ch. 35, § 3; Foster, 361; *Rex* v. *Pedley*, 1 Leach, 242, stated their opinion as follows: "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

In *Durham* v. *The People*, 4 Scam. 173, this court said: "One general rule on this subject we apprehend to be, that where the facts charged in the second indictment would, if true, have procured a conviction on the first, then the plea of *autrefois acquit* is well pleaded."

In the case at bar, the facts charged in the second indictment were not admissible in evidence under the first, and could not legally have produced a conviction on that indictment. The plaintiff in error has made the record of the proceedings under the first indictment a part of his plea, and it appears therefrom, that no evidence was in fact offered to the jury under that

indictment. The people's attorney doubtless ascertained, that his evidence would be legally inadmissible, and declined to offer it. Had he offered to prove the charge contained in the present indictment, to wit, that John Guedel killed Adam Zimmerman by beating him upon the head with a gun, the evidence as to the mode of perpetrating the homicide would have been inadmissible. The first indictment was not sustainable by proof of the facts alleged in the second, and it necessarily follows, that in regard to the offense, that is, the facts charged in the second indictment, the plaintiff in error has never been in legal jeopardy. To persons not accustomed to legal distinctions, it may seem a solecism to speak of two indictments as charging different offenses when they relate to the murder of the same person, but it is nevertheless undoubtedly true, that, for the purpose of judicial proceedings, an indictment charging a murder to have been done by shooting with powder and shot from a gun, does describe a murder legally different from that described in an indictment charging the same defendant with a murder of the same person, by beating him upon the head; and this for the reason, that if all the facts charged in the second indictment were proved or admitted, the murder described in the first indictment would not be legally established so as to authorize a conviction. One of the material ingredients necessary to a legal description of the offense would be wanting. The proof might show a murder, but it would not be legally, and for the purposes of trial and punishment, the same murder described in the indictment. We must affirm this judgment.

Judgment affirmed.

John McDonald
v.
John R. Crandall.

1. Deed — *homestead — release of — its effect.* Where the owner of land, residing upon it, since the passage of the amendatory homestead law of 1857, with his wife, executes a deed of conveyance therefor, but they fail to relinquish the homestead exemption; *held*, that such a conveyance operated to

pass the fee, but suspends its operation until the grantor abandons the premises, or surrenders the possession to the grantee.

2. Where a party conveys the homestead, and the exemption is not relinquished in the mode prescribed by the statute, the grantee does not acquire such a title as would authorize a recovery in ejectment, or to defend against his grantor still remaining in possession, in an action for trespass to the premises.

3. HOMESTEAD—*judgment lien.* It is the law of this court, that the homestead, when occupied by the debtor, as such, is not subject to the lien of a judgment, and its sale by the debtor and a surrender of the possession to the purchaser, who was a junior judgment creditor, is valid against a prior judgment.

4. SAME—*excess above the exemption.* Where the homestead exceeds $1,000 in value, a judgment, mortgage, or deed of trust becomes a lien and may be enforced against the overplus; and the same is true of the excess, where there is a conveyance without a release of the exemption, as the grantee may enforce his rights to the surplus.

5. SAME—*homestead exemption not an estate.* The homestead act has not created a new estate, but simply an exemption, and where the holder of the homestead conveys, without relinquishing the exemption, he transfers the fee, but the operation of the deed is suspended until the premises are abandoned or possession is surrendered. The act will not bear the construction, that an estate is created which may be transferred and held by others than those specified in the statute. Such was not the legislative intention.

6. SAME—*sale—possession.* Where a sale by a trustee, and the trust deed under which the sale is made, does not release the homestead exemption, and the grantee is let into possession, he will hold the premises against a subsequent purchaser under a sale on a deed of trust which does release the exemption.

APPEAL from the Circuit Court of Jersey county; the Hon. D. M. WOODSON, Judge, presiding.

This was an action of ejectment brought by John R. Crandall, in the Jersey Circuit Court, against John McDonald. The declaration contained two counts, for the recovery of lot ten, in block six, of Adams' addition to Jerseyville, Illinois. Plaintiff claimed to own the fee. Defendant filed the general issue. A trial was had by the court, a jury having been dispensed with, by agreement of the parties.

It was agreed by the parties, that Joshua Bartlett, on the 4th day of April, 1859, owned the lot in controversy, and on

that day conveyed it to Horatio C. Twombly. That afterward, on the 23d day of June, 1862, Twombly and wife conveyed the property to Julius G. Koster, in trust, to secure a debt due from Twombly to plaintiff, for the sum of $324.20, due in six months from that date. The deed contained a power of sale by the trustee in case default should be made in payment of the debt. In the body of this deed there was a clause releasing the homestead exemption, and the wife acknowledged that she released her right to the homestead exemption, which is duly certified by the officer taking the acknowledgment. This deed was recorded in the proper office on the day it was executed.

Plaintiff also introduced a deed of conveyance from Koster, the trustee, for the property in controversy, to himself, dated on the 28th of February, 1863. It was admitted on the trial, that the trustee had given the proper notice, and, that default had been made in the payment of the money, and that Twombly, at the time he executed the deed to Koster, occupied and lived upon the premises with his family, and that the property in controversy was not worth more than $1,000.

The defendant introduced a deed from Horatio C. Twombly and wife to Nathaniel Twombly, as a trustee for Joshua and Joseph W. Bartlett, to secure three notes from H. C. Twombly, with the two Bartletts' securities, for $100, each payable to the trustees of schools T. 7, N. R. 10 W. in Jersey county. This deed bears date on the 4th of April, 1859, and was recorded on the 25th day of the following August, in the proper office. Neither this deed nor acknowledgment releases the homestead exemption.

Also a deed from Nathaniel Twombly, as trustee, to Joshua Bartlett, which conveys, for the consideration of $325, the premises in controversy, dated the 17th of November, 1862. Likewise, a deed from the trustee to Joshua Bartlett, executed for the purpose of confirming the former sale and conveyance to Bartlett, and to cure defects in the previous deed. This last deed was executed on the 16th of October, 1866. Also, a deed from Joshua Bartlett and wife, to defendant, dated on the 20th of December, 1862.

It further appeared, from the testimony introduced on the trial, that H. S. Twombly, in 1857, went into possession of the property under a conveyance from N. L. Adams. That to pay Adams he had borrowed a part of the money from the trustees of schools T. 7, N. R. 10 W. That one John Hart became his security for its payment, and, to indemnify him, Twombly and wife conveyed to him the premises in controversy. That on the 3d of April, 1858, these notes to the trustees were taken up, and new ones given by Twombly, and Joshua and Joseph Bartlett, as sureties, and Hart and wife conveyed the premises to Joshua Bartlett, who, on the next day, conveyed the premises to H. C. Twombly, and he at the same time executed the deed of trust to Nathaniel Twombly to secure the Bartletts against loss on the notes. That Joshua Bartlett was compelled to pay the notes and then purchased the premises at the trustees' sale. And that defendant had been let into possession under the deed of conveyance from the trustee of whom he purchased, and that he so occupied the premises.

The court found the issue for the plaintiff, whereupon defendant entered a motion for a new trial, which was overruled, and judgment rendered for the recovery of the lot. To reverse that judgment the defendant brings the case to this court by appeal.

Messrs. WARREN & POGUE, for the appellant.

Messrs. A. L. & R. M. KNAPP, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

In this controversy both parties derive title to the lot in dispute, from the same common source. One H. C. Twombly and wife, at different times, executed trust deeds to two different trustees, to secure debts owing by him to different parties. Default having been made in payment, each of the trustees at different times advertised and sold the property, which was

purchased by several persons. Appellant claims by purchase at the sale under the trust deed first executed, which was also first recorded, and under which he had entered into, and was holding, possession when this suit was brought to recover the premises. Appellee claims by a purchase under the trust deed last executed, and under which it was sold by the trustee in the mode required by the instrument. Twombly and wife did not, by the first trust deed, relinquish their right to claim the benefit of the homestead law, but did in the latter. It also appears, that he was within the provisions of the act, and the deeds having been made after the adoption of the amendatory act of 1857, these trust deeds were subject to its provisions.

This, then, presents the question whether a deed executed subsequently to the passage of the amendatory act of 1857, without relinquishing the homestead right, is void, or whether it takes effect, in case the property is surrendered, and the purchaser is put into possession by the grantor. Or may he, after a sale of the fee, without releasing the homestead, and letting the purchaser in, sue for, and recover the premises under the right to claim the homestead. Or can he afterward sell and convey the homestead right to another, so as to authorize the second purchaser, to recover and hold the property under the homestead right, as against the owner of the fee.

In the case of *Patterson* v. *Kreigh*, 29 Ill. 514, it was held, that when the wife failed to join in the release of the homestead right, the grantee did not acquire a title such as would authorize him to eject the grantor still in possession of the homestead. In that case it appears, that the grantor was within the provisions of the homestead act. And it was held that the grantee, not being in possession, could not assert it against his grantor, as he had never released it in the mode prescribed by the statute, and had not surrendered the possession. Again, in the case of *Best* v. *Allen*, 30 Ill. 30, it was held, that a purchaser at a trustee's sale under a trust deed, in which the wife had not released the homestead right, could not defend an action brought by the person who executed the deed of trust, and who had not abandoned or surrendered the possession, for a

trespass to the premises. Other cases decided by this court announced the same rule.

It has also been repeatedly held, that the homestead right was not subject to a judgment lien. That the right could be transferred with the fee, and the grantee would take it notwithstanding a judgment was in existence against the grantor when the conveyance was made. And that the sale of the homestead, and its surrender to the purchaser, who was a junior judgment creditor, would be sustained as against a title derived from a sale under the prior judgment.

It has, however been held, that where the homestead property exceeds $1,000 in value, a judgment, a mortgage, or deed of trust becomes a lien, that may be enforced against the overplus. So of a conveyance, without a release of the homestead exemption, where the value exceeds the exemption, the grantee can enforce his rights against the surplus, by partition or otherwise. It is only the right to claim the homestead, and to continue to use and enjoy it, that is protected. The ultimate fee is, no doubt, conveyed by a regular deed, properly acknowledged, although it fails to release the homestead right. But in such case the fee is subject to the right of the grantor to hold it as a homestead, in the manner and for the period prescribed by the statute. *Young* v. *Graff*, 28 Ill. 20. In this case, it was held, that the premises upon which a debtor held a homestead, might be sold under a decree in chancery, subject to the exemption. The cases which hold that conveyances of the property without releasing the homestead, do not affect or transfer the homestead, must be understood as relating to, and distinguishing between, the fee, the ultimate right of property, and the exemption created by the statute. That such a conveyance passes the title to the premises, but not the right of possession as against the homestead exemption conferred by the statute. The grantee may acquire the fee or other estate of the grantor in the property, but he will retain the right to hold and enjoy it, unless he abandons or releases it in the mode prescribed in the statute. And in such a case the law will protect the right until it is released, or abandoned.

The question then arises, whether a grantee, by a deed which fails to release the homestead exemption, becomes invested with the right to hold the premises, when the vendor has abandoned the possession, ceased to occupy them as a homestead, and placed his purchaser in possession. As between these parties there can be no question but that he may. *Brown* v. *Coon*, 36 Ill. 243. But it is contended that the homestead right is a species of estate, that can only be released by a deed of conveyance. In the various cases which have heretofore come before the court, where the right has been protected as against grantees and judgment creditors, the vendor or the debtor has been in possession of the homestead, never having abandoned it, or placed the purchaser in possession. The question has not previously arisen between two voluntary grantees, in the conveyance to one of whom the exemption was released, and not to the other. In the case of *Green* v. *Marks*, 25 Ill. 221, it was held, that the debtor being entitled to the benefit of the act, could sell the premises, and transfer the possession free from a judgment lien, as none attached. And in the case of *Bliss* v. *Clark*, 39 Ill. 590, it was held, that the grant of the homestead to a junior judgment creditor, with a surrender of the possession, would hold against a sheriff's deed, on a sale made under a prior judgment, whilst the premises were occupied as a homestead by the debtor.

When the grantor conveys the premises and places the grantee in possession of the homestead, we must hold that he thereby abandons it and the right to insist upon the exemption. The abandonment of the homestead is one of the means provided in the statute by which the right may be lost, and when he surrenders possession to his grantee he unmistakably abandons the homestead, although the deed does not contain a release of the right.

It is, however insisted, that the homestead act has created a new estate previously unknown to the law, which is claimed to be separate and distinct from the fee or other estate. That the homestead right, as distinguished from the homestead itself, may be sold and conveyed separately from the fee, and the

grantee succeed to the right of possession during the life of the head of the family, or those entitled to claim its benefit, had the sale never been made. We have seen, that the right to claim the benefits of the act may be lost by abandoning the homestead. When the holder conveys the premises without releasing the benefit of the act, it may be claimed by him or those specified in the act, until he abandons the homestead or surrenders its possession to the grantee. When he has done either, then the right ceases, and the conveyance before made, and which conveyed the fee, but the operation of which was suspended to acquire possession, becomes operative for the purpose for which it was executed, unless otherwise defective.

If a construction should be given to this act, that it created an estate, which could be conveyed to, and enjoyed by, others after the owner has conveyed the fee, abandoned the premises, and they had ceased to be his home, then the provision of the statute which declares that the right shall cease when the homestead is abandoned would be virtually abrogated; such could not have been the design of the law makers. It is manifest, that they intended only to protect the debtor or the vendor so long as he or his family remained in the possession, and not his grantees of the right, after selling the fee and abandoning the property as his home.

In this case, the grantor let the purchaser under the first deed of trust into possession, and although he and his wife had not relinquished the homestead exemption by that deed, still the conveyance to the purchaser at the trustee's sale, when he was let into possession, became operative to hold the premises against the grantor or his subsequent grantees, either with or without a release of the homestead exemption. The operation of the first deed was to pass the fee when it was executed, but only suspended the power to acquire possession until the homestead was abandoned or possession delivered under the deed. Possession was delivered in this case to the purchaser under the first deed of trust, and the purchaser under the second deed, failing to acquire the fee, obtained no right to hold the premises as against the first grantee, by procuring

a release of the homestead exemption in the junior deed of trust. That conveyed no seperate estate, but simply estopped the grantors from claiming the benefit of the act as against the purchasers from the trustee, under the junior deed of trust. When the second deed of trust was cut off by a sale under the first, the fee and the release of the homestead by that deed both failed together. When the first purchaser was let in, he thereby united his fee to the right of possession, and could assert them against his grantor, and all of his subsequent grantees. The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

FRANKLIN L. RHOADS, Executor, etc.,

v.

MARTHA H. RHOADS *et al.*

1 GUARDIAN AD LITEM — *appointment of.* When the record shows the appointment of a guardian *ad litem,* but no motion therefor, nor prayer therefor in the bill, such appointment will be considered the act of the court on its own motion, which it might make, *sua sponte.*

2. SAME — *answer of — not binding on infants.* A guardian *ad litem* cannot bind the infants by any thing he may do, or admit in his answer.

3. SAME — *need not be related to infants.* Under our practice it is not necessary that the person appointed as a guardian *ad litem,* should be a relative of the infants.

4. SAME — *appointment of — on plaintiff's motion.* Where the minors are not brought into court, and one of them is within one year of being of age, it would not be proper to appoint a guardian *ad litem,* on the motion of the plaintiff's counsel, as he is not the person to name such guardian.

5. EXECUTOR — *one appointed as executor, merely, does not become a guardian.* Where a person is named in a will as executor, merely, he does not in virtue of such appointment, become testamentary guardian of the infants.

6. GUARDIAN AD LITEM — *must answer before final decree is entered.* Where a guardian *ad litem* has been appointed, it is error for the court to enter a final decree against the infants without requiring an answer from such guardian.

7. SAME — *must defend the interests of the infants.* The rule is inflexible that a guardian *ad litem* must defend the interests of the infants as vigorously

as the nature of the case will admit. It is his special duty to submit to the court every question involving the rights of the infants affected by the suit.

8. INFANTS — *rights of — in suits against.* A bill cannot be taken as confessed against infants, under any circumstances, nor their interests decreed away without an answer by their guardian *ad litem*, or on full proof. A default cannot be entered against them, nor can any thing be admitted, but every thing must be proved against infants, and the record must furnish proof to sustain a decree against them, whether the guardian *ad litem* has answered or not.

9. WRIT OF ERROR — *where there are adult and infant defendants.* Where there are adult and infant defendants, and the writ of error is in fact prosecuted by the adults alone, they cannot assign for error those proceedings which only affect the interests of the infants.

10. TESTATOR — *power of disposition of estate unlimited.* Under our statute, the power of the testator to dispose of his estate is unlimited, both as to person and object.

11. SAME — *may pass by his children.* A testator of sound mind may pass by his own children, in making a testamentary disposition of his estate.

12. SAME — *may prescribe the time and mode of enjoyment.* And he may prescribe the time and mode in which the bounty shall be enjoyed, provided, that in so doing, he contravenes no well recognized and admitted principle of public policy, or rule of right.

13. DEVISE — *savoring of a perpetuity.* The law abhors every disposition of property which savors of a perpetuity.

14. SAME — *of executory limitation.* But an executory limitation to a life, or any number of lives, and twenty-one years afterward, is valid.

15. Where a testator disposed of his whole estate, devising it to executors in trust for all of his children, one-half of whom at the time of his death were adults, the proceeds of the estate to be invested and re-invested in government bonds, and at the expiration of fifteen years after the testator's death, the estate, with its accumulations, to be divided equally among them; *held*, that such disposition was clearly within the testamentary power.

16. WILL — *within the power of testator to make — will not be disturbed.* The will being such an one as the testator had the power to make, it will not be disturbed; and devisees under it can only come into the enjoyment of their respective shares, in the mode prescribed by the will.

17. SAME — *when time of payment may be anticipated.* In such a case, a court of chancery, on a proper case being made out, has the power to order the trustee to anticipate the time of payment under the will, so far as it may be necessary for the maintenance of the devisees; but its power extends no further. And such action in no wise tends to subvert the will, the court having the power to do, what it is evident from the will that the testator would do, if he were living.

WRIT OF ERROR to the Circuit Court of Gallatin county; the Hon. WESLEY SLOAN, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. RAUM & CHRISTY, for the plaintiff in error.

Messrs. OLNEY & LANDSEN, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

John T. Jones, of Gallatin county, on the 30th day of March, 1863, made his last will and testament, by the first clause of which, he appointed his widow, Hannah M. Jones, his executrix, and his son-in-law, Franklin L. Rhoads, the plaintiff in error, his executor. By the *second* clause, he directed, that as soon as it could properly be done, his executrix and executor should invest the sum of $25,000, which he then had on hand, in cash, in United States bonds, bearing interest, to be held by them, in trust, for the purpose, and during the period thereafter fixed. By the *third* clause, he directed his executors, as soon as in their judgment it should be proper, to sell certain bonds of the State of Tennessee, which he then had on hand, seventeen in number, and invest the proceeds in interest-bearing bonds of the United States, to be held in trust, as thereinafter specified. By the *fourth* clause, he devised and bequeathed to his executrix and executor, to be held in trust, as thereinafter expressed, certain United States seven-thirty bonds, which he then had on hand, amounting to $25,000, and all his estate and property of every kind and character, rights, money, credits and effects, personalty and real estate; and he, thereby, gave and granted to his executrix and executor full power and authority, to collect any and all the debts due to him in the same manner that he could do himself, and to sell any and all of his personal property, lands or other real estate in such manner, at such times and upon such terms, as they in their judgment and discretion should determine, and to convey, by deed, such lands and other real estate as they might sell under this power. He, also, by the

same clause, willed, that all this property, rights, credits and effects, should be held by his executrix and executor, in trust, for and during the period of fifteen years, from and after his death, for the purpose of investing the same, and all money which may be received by them in any way, as the proceeds of sales of land, or other real estate, or personal property, or in the collection of debts, or which might in any manner arise out of his estate, in United States bonds, bearing interest. By the *fifth* clause, he desired, that all interest accruing upon bonds, or in any other way, should be promptly invested in United States bonds, bearing interest, declaring his object to be, to have all his estate, so soon as might be, invested in interest-bearing government bonds, and all accumulations re-invested in the same way, so as to increase his estate as much as possible in the mode indicated, during the existence of the trust, for the benefit of his wife and children; with the distinct understanding, that his executrix and executor should retain in their hands, at all times, sufficient means to provide for the proper support of his wife and her family, and for the education of his youngest children, the amount proper for such purposes to be left to their judgment and discretion. He then declares, that his executrix and executor shall have all the powers and discretion, not therein expressly set forth, necessary to enable them to wind up the business of his estate, and to execute the trust delegated to them, according to the true intent and meaning of his will; but he wished it to be distinctly understood, as expressly enjoined on them, that all investments in bonds or stocks, must be in United States bonds, bearing interest. The *sixth* clause, requires his executrix and executor to pay over at once to William L. Caldwell, his son-in-law, if he should wish to go into business, the sum of $5,000, to be charged against his daughter Mary, as an advancement, etc. He then declares, "At the end of fifteen years from and after his death, the trust, thus created, shall cease, and all his estate then to be distributed among his wife and children in this manner, viz.: The sum of $10,000 to be paid to his wife, to be held by her as her absolute property; the remainder of

his estate to be divided among his children, according to the laws of this State, each one of the children to be charged with such sums as have been or may be charged against them as advancements."

The remaining portions of the will provide merely for executing the trust in case of the death of either the executrix or executor named in the will, or both.

To this will was a codicil, executed on the 31st day of March, 1863, only important as showing the confidence the testator had in the persons appointed to execute the trust, by directing, that neither of them should be required to give any bond or security whatever, for the proper execution of the trust.

The testator died on the 5th day of April, 1863, and his widow Hannah, on the 3d day of September, following. Since her death, the plaintiff in error, Franklin L. Rhoads, as surviving executor, has thus far executed the trusts under the will.

Eight children survived the testator and his widow, five of whom are now adults, and defendants in error, the other three are minors, and are with Franklin L. Rhoads, the plaintiff in error, included in the writ of error.

The adults filed their bill in chancery, in the Gallatin Circuit Court, at the August Term, 1866, setting forth, that the surviving executor had sold all, or nearly all, the personal property, and some of the real estate, and had collected a portion of the debts, and had invested the money, amounting to $120,000, in United States bonds, bearing interest, and also alleging, that of the real estate, there remained unsold forty-five town lots, and fifteen thousand eight hundred and twenty-eight and one-half acres of land; and suggesting, that the minor children cannot be prejudiced by a division of the moneys and bonds and lands of the estate, and that the executor holds notes due the estate, which are available for more than $25,000, some of them due and payable, and others to fall due, and all drawing interest from six to ten per cent, and that the support and education of the minors will not cost more than $10,000 and alleging, that Basil H. Jones, one of the children,

has no means whatever, except his interest in this estate, and has no trade or profession, and has a family to support, and that William L. Caldwell is dead, leaving no property beyond the payment of his debts, and his widow, Mary, one of the complainants, has only about $1,000, besides her interest in this estate, and has a family of three children, the eldest of whom is not ten years of age; they prayed the court that the plaintiff in error, and the minor children should be made defendants, and that they be required to answer the bill, and that the surviving executor shall state fully the then condition of the estate, showing the amount of money and bonds on hand, and the description of the lands belonging to the estate, and that upon a final hearing, the court would direct the executor to pay to each complainant one-eight part of the money and bonds on hand, and require him to make yearly settlements with the County Court, and pay the moneys remaining on hand to the parties entitled thereto, and who may have attained their majority, and as each minor arrives at full age, the executor be required to pay such person his or her interest in those moneys and bonds, deducting the advancements made in all cases; and they also prayed for a partition of the real estate, and for the appointment of commissioners to make partition, and for general relief. William G. Bowman was appointed guardian *ad litem*, for the infant defendants.

The executor filed his answer, admitting all the material facts alleged in the bill, and alleges, he paid William L. Caldwell $5,000 on the 11th of May, 1863, and Basil H. Jones $1,500 on the 31st of May, 1865, in obedience to an order of the court.

The executor denies, that the children of the testator are the only persons who have any interest in the trust fund, and he denies, that each one of them has one-eight part of the same, and submits the question, whether or not the entire estate of the testator does not, by the terms of the will, vest absolutely in the executor, as trustee, for the period of fifteen years from the death of the testator; and whether any part of the property, real or personal, vests in the children prior to the termination

of the trust; and whether the property does not then vest in the children according to the number then living, to be distributed among them, according to such laws of this State as may be then in force.

The executor admits, he has sold nearly or quite all of the personal property, that he has collected some of the debts, and has sold some of the real estate, and has invested the proceeds in bonds, and has on hand $119,000, in United States bonds, bearing interest, and about $1,000 in money. He admits he holds promissory notes, and other evidences of indebtedness, due by divers persons, but cannot say how much is collectable, but believes enough can be collected to support and educate the minor children, and thinks $10,000 will be sufficient for that purpose. He submits to the court, first, whether it is the law, that the trust created by the will can be declared void for the single reason, that no person is to participate in the division of the estate except the children of the deceased; second, whether the trust shall be destroyed, and the estate divided, because one or more of the heirs may, from time to time, be in necessitous circumstances, which could justify the chancellor in relaxing the stringent provisions of the will, by providing relief for those requiring aid, and, finally, shall the trust be destroyed without attacking the will itself, for the mere convenience of a part of the heirs in the absence of a necessity therefor. He admits he has no personal objection to a division of the estate, if consistent with law, and he can be held harmless. He believes the testator, in making the will, had the prosperity of his heirs in view, and that, in carrying out the will, he is actuated by conscientious motives, and will cheerfully conform to orders of the court, but will do no act reflecting upon the validity of the will, or the trust created by it.

The cause was submitted on the bill, answer, exhibits and proofs. During the progress of the cause, the court made an order for the payment to Basil H. Jones of $1,000, and directed the same to be charged to him as an advancement.

The court found, that plaintiff in error had in his hands, as trustee for the eight children of the testator, bonds amounting

to $122,000; that there had been advanced to four of them, various sums of money, amounting in the aggregate to more than $14,000, and the court found, that testator devised all his estate, real and personal, for the use and benefit of his eight children, and that each of them was then entitled to, and was the owner in fee-simple of, the undivided eighth part of the real estate specified.

The court then ordered, that the trustee, plaintiff in error, pay to each of the adults, a sum of money, which, with what they had received, would make the sum $17,000, for each of the infant children, and that the executor, as their testamentary guardian, invest the principal, interest and accumulations of each of these sums of $17,000, in the name, and for the benefit of the infants, respectively, and separately; and as to such sums, the testamentary guardian shall carry out the requirements of the will, until they shall respectively arrive at full age, the boys to the age of twenty-one, and the daughter, Fannie, until she arrives at the age of eighteen years, and as each minor arrives at full age the guardian shall pay the sum of $17,000, with all interest and accumulations to each person. It was further ordered and decreed, that the executor make report to the next term, of his actings and doings as such executor and trustee, showing the assets which have come to his hands, including all moneys, and also what credits he may be entitled to, and the amount of United States bonds, and money then on hand belonging to the trust fund. It was also decreed, that all the lands be partitioned, if partition can be made without great prejudice to the owners, and commissioners were appointed to make such partition, and to report to the next term.

To reverse this decree the record is brought to this court, and the following errors assigned:

1. The court erred in appointing a guardian *ad litem* for the minor defendants, in the absence of a prayer in the bill for the appointment of such guardian.

2. The court erred in not requiring or permitting F. L. Rhoads, testamentary guardian, to defend for said minors.

3. Having appointed a guardian *ad litem*, for the minor

defendants, the court erred in entering a final decree without requiring such guardian to answer for the minors.

4. The court erred in entering a final decree requiring a division of the money and lands of the estate of John T. Jones, deceased, — First, because the validity of the will of deceased was not called in question. Second, because the will of deceased, whereby he bequeathed his entire estate of real and personal property to Franklin L. Rhoads, the plaintiff in error, in trust for fifteen years, for the benefit of the heirs of the deceased, then to be divided among them according to the laws of Illinois, is not contrary to public policy, or in violation of the law. Third, because the title of property so bequeathed by deceased, is vested in the trustee, F. L. Rhoads, and not in the heirs of deceased. Fourth, because in construing the will of deceased, the intention of the testator must be the governing principle; and, before the court could be justified in ordering a division of the estate contrary to the terms of the will, it must appear, that there is some grave necessity compelling such division, and in this case such necessity does not appear to have existed. Fifth, because it was the evident intention of the testator to provide a home for his younger children; and the decree deprives such younger children of a home, by ordering a division of the homestead. Sixth, because it was the evident intention of the testator to provide support and education for the younger children out of the general trust fund; and the court, in dividing the estate, failed to make an order and certain provision to carry out that portion of the will.

5. The court erred in not fixing the compensation of F. L. Rhoads, plaintiff in error, as trustee of said estate.

The errors most important in this assignment, will be noticed, if not in detail, will be so considered, that the views of this court, on the main questions presented, will be fully understood.

As to the first three errors assigned, they relate to the practice in such cases. It appears from the record, that William G. Bowman was appointed guardian *ad litem* for the infant defendants, although there was no prayer in the bill, asking for such an appointment.

It is usual to insert such a prayer in the bill, and it is the better practice. It is not unusual, in the practice of our courts, to make such appointment on motion of either party. This record does not show, that any such motion was made. The only entry therein, on this matter, is, after entitling the cause, this order, "ordered that William G. Bowman, Esq., be appointed guardian *ad litem* for the minor defendants, and it is further ordered, that the defendants be ruled to answer. And now comes Franklin L. Rhoads and files his answer, and the said Rhoads files his motion for allowance as executor of the estate of John T. Jones, deceased."

The appointment of a guardian *ad litem* is something more than mere form, although such guardian cannot bind the infant by any thing he may do, or admit in his answer, yet we would not be inclined to reverse a decree where the record showed the appointment, but no motion for such appointment, nor prayer therefor in the bill, believing the court might, *sua sponte*, make the appointment.

By the English practice, and in some of the courts of chancery in this country, the appointment is made by the court, of the nearest relative of the infants not concerned in point of interest in the matter in question. This person appointed, William G. Bowman, does not appear by the record to be a relative of the minors, which, under our practice, is not objectionable. If the record showed, that he was appointed on the motion of the complainants, without the minors being brought into court, one of whom was within one year of being of age, this would be contrary to the most approved usage, and be a mark of inexcusable inattention, as the adversary counsel is not the person to name the guardian to defend the infants. Cooper's Eq. 109; *Bk. of U. S.* v. *Ritchie et al.*, 8 Peters, 143; *Knickerbocker* v. *De Freest*, 2 Paige, 304. But, considering it the act of the court, without the interference of the complainants, and on its own motion, we are not disposed to consider it as error.

How Rhoads became testamentary guardian, we are at a loss to perceive. He is not made so by the testator's will, nor is he

such in virtue of his appointment as executor; of course, then, he could not defend for the minors, and the action of the court was proper in appointing a guardian *ad litem*, but there should be some evidence, that the person appointed accepted the trust, which this record does not furnish. No answer is filed by him, nor plea, nor any defense made of any kind, nor any formal acceptance, one or the other of which should appear on the record. This brings us to the consideration of the third error, that the court having appointed a guardian *ad litem*, erred in entering a final decree without requiring an answer from such guardian.

The rule is inflexible in this State, that the guardian *ad litem* shall make a defense of the interests of the infant as vigorous as the nature of the case will admit. *Sconce* v. *Whitney*, 12 Ill. 150; *Enos* v. *Capps*, id. 255. It is understood to be the special duty of such guardian to submit to the court, for its consideration and decision, every question involving the rights of the infant affected by the suit. This is the scope of the decisions in those cases above referred to, and is so distinctly announced in *Dow* v. *Jewell*, 1 Foster (N. H.) 486, and in *Knickerbocker* v. *DeFreest*, 2 Paige, 304, cited *supra*. A bill cannot be taken as confessed against infants under any circumstances, nor their interests decreed away without an answer by the guardian *ad litem*, or on full proof. Nor can a default be entered against them. *McClay, Administrator*, v. *Norris*, 4 Gilm. 370; *Cost* v. *Rose*, 17 Ill. 276; *Chaffin* v. *Heirs of Kimball*, 23 id. 36; and it is further held, that nothing can be admitted, but every thing must be proved, against an infant. *Hitt* v. *Ormsbee*, 12 id. 166; *Hamilton* v. *Gilman*, id. 260; *Tuttle* v. *Garrett*, 16 id. 354; *Reddick* v. *President of the State Bank*, 27 id. 148; and strict proof is required, and the record must furnish proof to sustain a decree against them, whether the guardian *ad litem* answers or not. *Masterson* v. *Wiswould et ux.*, 18 id. 48; *Chaffin* v. *Heirs of Kimball*, *supra*; *Tibbs* v. *Allen*, 27 id. 129.

It may be said by defendants in error, that this proceeding, and the decree thereon, were for the benefit of the infants, but the record fails to furnish any evidence of that. Not a particle

of proof is found in the record, that it would benefit the infants to disturb the will of the testator in the manner sought, or that they would be benefited by putting under their control a large body of lands, much of it unproductive, on which they would be required to pay the annual taxes, and without any guardian to advise and direct them in its proper management.

It does not, however, appear, that the infant defendants have joined in prosecuting this writ of error, although the writ appears to have been sued out in their names jointly, with that of Franklin L. Rhoads, the executor, but they do not assign errors. In the case of *Tibbs* v. *Allen*, *supra*, it was held, the writ of error being prosecuted by two of the adult defendants only, they could not assign as error such proceedings of the court below as affect the infant defendants only. The plaintiffs in error cannot be injured by any proceedings against the infants, however irregular they may have been. 27 Ill. 125.

These, however, are all of them unimportant questions in this case. The great question remains to be considered, as involved in the fourth error assigned, which is this: The court erred in entering a final decree, requiring a division of the money and lands of the testator for the reason, principally, that it was in direct opposition to the will of the testator.

On this assignment of errors, the merits of the whole case are brought before this court. New and important questions are raised by it, and doctrines maintained by the counsel for the defendants in error in regard to the construction of wills, requiring us to look attentively and searchingly into the books cited as authority on the several points made by the parties.

The counsel for the plaintiff in error insists, that this decree can be sustained only upon one of two grounds: First, that the will of the testator creating a trust to endure fifteen years after his death, is contrary to the policy of the law, and therefore voidable; or, second, that the provisions of the will in reference to the management of the estate, are merely directory, and may be altered or abrogated according to the discretion of the court.

The defendants in error contend, that the children of the testator are the only beneficiaries under the will, and that on

the death of the testator the interest in the property vested absolutely in them, with no limitation over, or conditional interest in any other persons, and that the interest of no one of the children is contingent. They insist, that all that part of the will making the trust and providing for sales, accumulations, etc., was intended to secure to the children the entire fund, with its accumulations, the sole object being, that his children should have all his property; and that all else in the will is directory merely—that a mode is provided by which his object shall be attained. Thus, it will be seen, the parties before us, are directly opposed, and it is for this court to decide between them.

The first question presented, involves the power of the testator to make the will in question, with the provisions in it in regard to accumlations, and their investment and re-investment. To determine this, reference must be had to our statute conferring the power to devise estates by will. Here, it will be seen, the power is conferred in plain language: "Every person aged twenty-one years, if a male, or eighteen years, if a female, or *upward*, and not married, being of sound mind and memory, shall have power to devise all the estate, right, title and interest in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents charged upon or issuing out of them, or goods and chattels and personal estate of every description whatsoever, by will or testament."

It will be perceived, this power is unlimited as to person or object, and we have held, if the testator be of sound mind and memory, he may pass by his own children on making a testamentary disposition of his estate. *Heuser et al.* v. *Harris, Ex., et al.*, 42 Ill. 425.

This being so, we are at a loss to perceive, if a testator can select the objects of his bounty, why he cannot also prescribe the time and mode in which that bounty shall be enjoyed, provided always, in so doing, he contravenes no well recognized and admitted principle of public policy, or stubborn rule of

right. From the earliest times, courts of justice have set themselves against such a disposition of property by will as would have the effect to tie up the land and capital of the country, obstructing thereby the free and active circulation of property, checking the improvement of the land and rendering its acquisition difficult; and, in short, to every disposition of it savoring of a perpetuity, which the law abhors. Yet, notwithstanding this, it has never been denied, so far as we are advised, that an executory limitation to a life or any number of lives in being, and twenty-one years afterward, is valid. Can it be doubted, that a testator, with a family of children, some of them grown, married and settled in life, and others of them infants, may devise his estate to executors with power to sell and convert it into money to be put at interest, and so remain until the youngest child, then not one day old, shall arrive at full age, and then the fund to be divided equally among all the children? In such case, which is but an ordinary limitation in strict settlement, no court would hold, that it was void for remoteness; yet, the time of enjoyment, by the beneficiaries, is more remote than that fixed by this will.

Defendant's counsel start with the proposition, that, "where moneys are directed to accumulate until the beneficiaries arrive at an age beyond adult age, they may have the fund on arrival at adult age, and that this is settled beyond controversy." The authorities to which he refers, are, Williams on Executors, 119· Lewis on Perpetuities, 528 to 531, and note *p*; *Saunders* v. *Vantier*, 4 Beavan, 115, and S. C. in 1 Craig & Philips, 240; note 4, p. 248; *Jossellyn* v. *Jossellyn*, 9 Simon, 63; *Leeming* v. *Sheratt*, 2 Hare, 21, and note 1; *Roche* v. *Roche*, 9 Beavan, 66, and *Curtis* v. *Lakin*, 5 id. 155.

The reference to Williams cannot be accurate, as at the page indicated (119), in the brief and argument of defendants' counsel, the author is treating of the release of debts by legacies; and therewith, of the effect of appointing a debtor or a creditor to be executor.

We have looked into all the reported cases cited above which we have at command, and do not find any one of them support-

ing the broad doctrine insisted upon by defendants' counsel. And we have also referred to Lewis on Perpetuities, and note *p.*, in which the doctrine of *Saunders* v. *Vantier*, 1 Craig and Philips, 240, S. C., 4 Beavan, 115, and of *Jossellyn* v. *Jossellyn*, 9 Simon 63, is discussed.

The author of note *p* refers to the remarks of a recent writer (Hargrave) on the "Thellason act" (39 and 40 George III, ch. 98), directed against perpetuities. This writer maintains, that in the cases of *Jossellyn* v. *Jossellyn*, and *Saunders* v. *Vantier*, "all consideration of this act was excluded, the court proceeding to the construction of the testator's will precisely as if that act had not passed, and having in each case held, that the infant took an immediate vested interest in the legacy, ordered the fund, with its accumulations, to be transferred to the infant on his attaining twenty-one years of age; although the testator had directed the accumulation to continue in the former case, until the donor had attained to twenty-four, and in the latter, until he had attained twenty-five years of age; and although in both cases, the accumulation, as directed by the testator, would not have exceeded the statutory limits."

The author of the note insists, that the true ground of the decisions in these cases is, that the legacies being vested at once, and there being merely a postponed enjoyment, without any gift over, in the event of the legatees not attaining such full enjoyment, the consequences of the right of property inevitably attached; one of which was, the power to assume an absolute control over, and therefore to demand a transfer of the fund immediately on attaining majority; it being open to the legatee, either to allow the accumulations to proceed until his attainment of the age specified in the will, or (as the attainment of a particular age was not of the essence of the gift) to anticipate the accumulations by taking the fund into his own hands, immediately the law gave him the power of affecting or disposing of his property. And he says, that this is the proper interpretation of the decisions in question, on one of the cases again coming before the court (4 Beavan, 115), is conclusively established by the observation of Lord LANGDALE, to the effect,

that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge."

We are at a loss to perceive the analogy between these cases —(and the others cited by defendants' counsel are of the same character)—and the one now before us. In this case, we are not dealing with legacies, or with remainders or residuums of an estate, but are called upon to uphold or overthrow the scheme adopted by the testator, for the disposal of his whole estate. No legacy is left to any one, unless the devise of $10,000 to his widow shall be considered a legacy, nor is any residuum or remainder spoken of, or treated of by the testator. He was disposing of his whole estate, and devised it to his executors in trust for all his children, one-half of whom at the time of the testator's death were of full age, the proceeds to be invested and re-invested in United States interest-bearing bonds, and when fifteen years shall have elapsed after the death of the testator, the whole fund should be equally divided among his children.

This case does not seem to have one single feature in common with the cases cited, or of any one of them, and we do not think there can be found a well considered case in any court to which we have been accustomed to look, as authority, where there is no restriction by statute on the testamentary power, in which a trust created as this is, has been held invalid. We do not think a case can be found, where a court, in the absence of such restraint, has, at the request of the beneficiaries under a will, subverted the entire will, and made that a present estate and to be enjoyed presently, which the testator emphatically declared should only be enjoyed at some future time. Admitting the power to devise as being unrestricted, this testator had the unquestioned right to give his estate to his children or to strangers, and to either he had the right to say at what period of time they shall come into the enjoyment and control of it. If they demand the estate under the will, it must go to them in the mode prescribed by the will.

It is not for the defendants in error, nor is it for the court to say, the will is unwise, and, therefore, we will make another one. It is sufficient to know this is the will of the testator, which he had the power to make, and, as we said at the outset, unless its provisions are subversive of some acknowledged principle of public policy, or of a clear right, it must stand. There is no room for construction of the will; its provisions are very plain and simple, evincing a high regard by the testator for his children, whose fortune it was his earnest desire to enhance, and the strongest confidence in the stability of a government in whose securities it was equally his great desire his large estate should be invested. Whether this was wise or not, it is not for us to say. The bill seeks to subvert the whole scheme of the testator, on the ground merely, that one of the sons has no trade or profession by which to live, and no means, and one of the daughters is a widow with a family of small children, and without means, except such as may come to them through this estate. We see nothing in the case, that would justify this court in breaking in upon the disposal of this estate, in the mode provided by the will, however much we may sympathize with the children, whose enjoyment of the estate is so long deferred. We have, however, no doubt of the power of a court of chancery, on a proper case being made out, to order the trustee to anticipate the time of payment, under the will, so far as it may be shown to be necessary for the maintenance of the devisees, but its power should extend no further. And it appears from the record, that this has been done in several instances, and can be done from time to time, as proper cases are presented to the court. This does not subvert the will, or tend to defeat the intention of the testator, for his children were the darling objects of his solicitude, and were he living, he would undoubtedly make ample provision for them. A court of chancery may do, what it is evident from the will, the testator would do if living.

We have left out of view all consideration of other topics stated by counsel, as unnecessary to be decided. We place the case on the ground, that the will must stand, as being within

the competency of the testator to make, and the devisees under it, if they desire the estate, must take it in the mode and at the time prescribed by the will.

These views dispose also of the question of partition, and of the power of the court to elect for the infants.

The decree must be reversed and the bill dismissed.

Decree reversed.

ELIZABETH D. ANDREWS *et al.*

v.

WILLIAM A. BLACK *et al.*

1. APPEAL—*lies from order of Probate Court, admitting, or refusing to admit will to probate.* An appeal lies from an order of the probate court, admitting, or refusing to admit, a will to probate. Such an order is within the express language of the 138th section of the statute of wills.

2. EVIDENCE—*on appeal—as to testator's sanity—confined to subscribing witnesses—where probate has been allowed.* On an appeal from the probate court, in relation to the probate of a will, where probate has been allowed, no other evidence can be heard on the trial, upon the question of the testator's sanity, than that of the subscribing witnesses.

3. FORMER DECISIONS. *Walker* v. *Walker*, 2 Scam. 291; and *Duncan* v. *Duncan*, 23 Ill. 365, explained and affirmed.

4. STATUTE OF WILLS—*construction of.* Section two of the statute of wills, directs what testimony to be made by subscribing witnesses, shall be sufficient to admit a will to record; provided, no proof be shown of fraud, compulsion, or improper conduct. The first proof is confined to subscribing witnesses, but the testimony of other persons, not otherwise disqualified, is competent on the matters named in the proviso.

5. EVIDENCE—*on appeal—as to sanity of testator—where probate has been refused—not confined to subscribing witnesses.* Under the act of February 25th, 1845, on appeal, other evidence than that of the subscribing witnesses, can be heard on the question of the testator's sanity, in cases where probate of the will has been refused.

6. SAME—*when testimony, other than that of witnesses may be heard—where probate has been allowed.* In cases where probate has been allowed, all persons interested, may, within five years after probate, under the 6th section of the statute of wills contest the validity of such will, and in this proceeding,

the sanity of the testator, or any other proper question, may be raised and heard upon any legitimate evidence. But where probate has been refused, no proceedings of this character can be resorted to.

7. The act of 1845, recognizes the construction adopted in the case of *Walker* v. *Walker*, 2 Scam. 291, leaving the rule to stand as decided in that case, where probate had been allowed.

APPEAL from the Circuit Court of Madison county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

At the November Term, 1865, of the probate court of Madison county, the will of one Andrew Black, after full consideration thereof by the court, upon proper proofs, was admitted to probate and record. At the same term, one of the devisees under the will, and child and heir-at-law of the said Black, prayed an appeal to the Circuit Court, from the order admitting the said will to probate, which was granted. On the appeal, the will was sustained, whereupon the case was brought to this court by appeal, and by agreement of counsel, only two points are presented by the record for its decision, which are stated in the opinion of the court.

Messrs. BILLINGS & BURNETT, for the appellants.

Mr. A. W. METCALF, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Cross errors are assigned by counsel in this case, and it is agreed there are but two questions to be considered; first, does an appeal lie from an order of the probate court, admitting a will to probate, and, secondly, if the appeal lies can any evidence be heard on the question of sanity except that of the subscribing witnesses?

The 138th section of the statute of wills, provides that, "appeals shall be allowed from *all* judgments, orders or decrees of the court of probate to the Circuit Court." That the admitting or refusing to admit a will to probate is a judgment, order or decree, cannot be denied, and it is, therefore, within the express language of the act. When the legislature

declares an appeal shall lie from *all* orders of an inferior tribunal, we have no right to say they did not mean what their language directly expresses. They could have used no words plainer or more comprehensive. The counsel for the appellees has given some very good reasons why an appeal might, with propriety, have been denied from orders admitting a will to probate; but to hold, in the face of the foregoing section, that it really has been denied, would be, not construction, but judicial legislation. It would be simply saying an important right does not exist, which the legislature declares shall exist. This we cannot say. So far as the professional or judicial experience of the members of this court goes, the practice has been uniform, and probably many estates have been settled under probates granted in the Circuit Court after having been refused in the lower tribunal.

The other question has been already settled in this court. In *Walker* v. *Walker*, 2 Scam. 291, it is explicitly decided, that no other evidence than that of the subscribing witnesses can be heard on the question of the testator's sanity, the decision being placed on the language of the statute. The counsel for appellants quote the case of *Duncan* v. *Duncan*, 23 Ill. 365, as overruling that in 2 Scam. But the two cases are harmonious. All that is decided in the case of *Duncan* v. *Duncan* relative to this subject, is, that other persons than the subscribing witnesses may be examined to invalidate the will. But the court was not speaking upon the question of sanity, but in reference to the latter clause of the second section, which authorizes proof to be given of fraud, compulsion or improper conduct. It is in reference to this species of proof, that the court hold in *Duncan* v. *Duncan*, that other than the subscribing witnesses may be sworn. This is a reasonable construction of the statute. It directs what testimony, to be made by the subscribing witnesses, shall be sufficient to entitle the will to record, with a proviso, that no proof be exhibited of fraud, compulsion or improper conduct. The first proof is confined to the subscribing witnesses, but the testimony of any other person, not otherwise disqualified, may be heard on the matters

named in the proviso. At the session of 1845, and after the decision in *Walker* v. *Walker*, which was made in 1840, the legislature passed a law (Purple's Stat. p. 1221) to the effect, that when probate of a will had been *refused* in the probate court and an appeal taken, on the trial of the appeal the same testimony should be admissible as on the hearing of a bill in chancery, filed under the sixth section for the purpose of setting aside a probated will. This act seems a recognition of the construction in *Walker* v. *Walker*, but intended so far to establish a new rule as to let in other evidence than that of the subscribing witnesses, on the question of sanity when probate had been refused, by implication, at least, leaving the rule to stand, as decided in that case, on the trial of appeals where probate had been allowed. The reason of this distinction, which at first sight seems purely arbitrary, is probably this: Where probate has been allowed, all persons interested are still granted, by the sixth section, five years within which to file a bill in chancery for the purpose of setting aside the will. In such a proceeding, the sanity of the testator or any other proper question, may be raised and heard upon any legitimate evidence. The probate is not conclusive. But, where probate has been refused, there is no proceeding of this character to which persons claiming under the will can resort. But for the act of 1845, if the subscribing witnesses give such testimony on the question of sanity as to induce a judgment against the will, the rights of such persons would be gone without redress, even though they could prove clearly by other witnesses, if permitted to use them, the sanity of the testator. This would be a great hardship, and might properly have led the court to hesitate before laying down the rule in *Walker* v. *Walker*. But, having laid down the rule, we cannot regard the act of 1845 as being other than a legislative recognition of it, as being a true interpretation of the statute, and they therefore proceed to limit the rule, by providing, that a particular case, in which it would work a hardship, shall not be within it. This manifests a clear intent to leave the rule in force as to cases not falling within the excepted class. In view, then, of

the former decision of this court, and of the act of 1845, we are of opinion the Circuit Court committed no error in excluding, on the subject of sanity, all testimony except that of the subscribing witnesses.

Judgment affirmed.

MARTIN DUNN
v.
CAROLINE RODGERS *et al.*

1. SHERIFF'S RETURN — *leave to amend.* *Held,* that the court may grant leave to a sheriff to amend his return to process either before or after a decree is rendered in the case, and that it is not error to grant such leave without notice to the opposite party. The return is not the service, but only the evidence of it. The officer makes the return to process at his peril; if false, he is liable to an action for the false return.

2. DECREE — *error on a bill of review.* Where a decree of foreclosure finds the amount of the debt due, and under a provision in the mortgage authorizing a decree for an attorney's fee, and for expenses of the mortgagee in bringing suit, and the master reports an attorney's fee of ten dollars, and the mortgagee two dollars for expenses, which is approved, but the court, in rendering the decree, added twelve dollars as an attorney's fee, but nothing for expenses: *Held,* the amount being the same, there was no error in the decree.

3. SAME — *error removed by sale of property.* Where the purchaser of the equity of redemption of mortgaged property is made a defendant to a bill to foreclose, it seems to be error to render a decree, that he pay the mortgage debt. The decree should be against the mortgagor, but by the sale of the mortgaged premises in satisfaction of the debt, the error is removed, and as the purchaser of the equity of redemption thus ceases to be liable, he cannot impeach the decree on a bill of review.

4. DECREE — *sale under — redemption.* Under the statute a mortgagor has twelve months within which to redeem the premises sold under a decree of foreclosure, and the purchaser of the equity of redemption succeeds to the same rights, and where he is made a party to a foreclosure, he must redeem within that time or be barred. Not being a judgment creditor he cannot claim a longer period.

APPEAL from the Circuit Court of Monroe county; the Hon. SILAS L. BRYAN, Judge, presiding.

Statement of the case.

This was a bill of review, filed by Martin Dunn, in the Monroe Circuit Court against Caroline Rogers, James A. Kennedy, Sarah Cook, Margaret Cook, Ellen Cook and Thomas Cook.

The bill seeks to impeach and reverse a decree previously rendered, foreclosing a mortgage executed by Alexander Cook and Sarah Cook, his wife, to the trustees of schools, T. 2, S. R. 11 W., for the interest due and unpaid on a debt owing by Cook to the school fund, on a number of tracts of land. The mortgage contained a clause, that if default should be made in the performance of the covenants in the deed, the mortgagor would pay all costs and expenses, including an attorney's fee, which might be incurred in collecting the same. Complainant, who had purchased the equity of redemption, was made a defendant to the suit for a foreclosure, as well as Cook's heirs, he having previously died.

A reference was had, and the master reported, that there was interest due on the mortgage the sum of eighty-four dollars, and that ten dollars was a reasonable attorney's fee, and that two dollars was reasonable compensation to the treasurer for his trouble in foreclosing the mortgage. The master's report was approved, and the decree was for the interest reported due by the master, and for twelve dollars as an attorney's fee, saying nothing about the two dollars reported in favor of the treasurer. This is assigned for error in the bill of review.

It is also assigned for error, that the return of the sheriff fails to show the summons was served on complainant. It is alleged, that complainant tendered the redemption money to Caroline Rodgers, the purchaser, after the expiration of twelve months from the sale, and within fifteen months, but she refused to receive the money as a redemption.

Defendant, Caroline Rodgers, answered, denying all irregularity and error in the decree, but admits the foreclosure sale, and the making of a deed to the purchaser by the master. That if complainant ever had any interest in the premises, it was barred and foreclosed by the bill. She admits the tender and refusal as alleged. Kennedy answered substantially the same Replications were filed.

It appears, that, on leave, the sheriff subsequently amended his return, so as to show, that all of the defendants were served in the foreclosure suit.

The cause was heard on bill, answers, replications, exhibits and proofs, and the court refused to grant the relief sought, and rendered a decree dismissing the bill. To reverse which, complainant brings the case to this court by appeal, and assigns the rendition of the decree as error.

Messrs. H. K. S. O'MELVENY and H. C. TALBOT, for the appellant.

Messrs. W. H. UNDERWOOD and KENEDY, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It has been held, that the court may authorize a sheriff to amend his return, either before or after the rendition of a judgment or decree. And this, too, without notice to the opposite party of an intention to apply for leave to amend. *Montgomery* v. *Brown*, 2 Gilm. 581; *Moore* v. *People*, 3 id. 149; *Johnson* v. *Donnell*, 15 Ill. 97; *Morris* v. *Trustees of Schools*, id. 266; *Turney* v. *Organ*, 16 id. 43. The indorsement made by the sheriff is not the service, but only affords evidence of the fact. Where the sheriff amends his return, he by no means changes the fact, but simply the evidence. He makes the return and the amendment on his responsibility and at his peril. If false, as amended, he is liable to an action for a false return. There was therefore no error in the return, as amended, upon which the decree sought to be reversed by this bill was based. When the amendment was made, the error was removed and could not be urged under the bill of review.

It is again insisted, that the original decree was erroneous, as it was rendered far too large an amount. By the terms of the note, to secure which the mortgage was given, it provided for the payment of twelve per cent interest, semi-annually and in advance. There were then four installments due, which

amounted to the aggregate sum of eighty-four dollars, as interest. The note and mortgage provided for the payment, by the debtor, of a lawyer's fee, and for expenses and trouble of the treasurer if suit should be brought. The decree sought to be reversed recites, that the master had reported eighty-four dollars interest as being due, and a solicitor's fee of twelve dollars, and approves the report and orders the payment of ninety-six dollars, within thirty days, and in default thereof, orders the sale of the mortgaged premises. It is insisted, that the master reported a solicitor's fee of but ten dollars. This is true, but he also reported two dollars for the treasurer's expenses, making the sum, when added, required to be paid by the decree. But, if this were not so, we should not be disposed to reverse a decree for so small a mistake in the sum due.

It is insisted, that the court erred in the rendition of the decree, which this bill seeks to reverse, by ordering the defendants to pay the money, plaintiff in error only being a nominal party, he having purchased the premises of Cook, subject to the mortgage. While the decree would have been more regular, had it been against Cook alone, for the money, still it appears that plaintiff in error has no right to complain, as the error was removed by the sale of the mortgaged premises. A decree against him, unsatisfied by the sale of Cook's property, might affect him, as in such a case, it would have left him liable for the decree; but the objection to the decree was removed by selling the premises and satisfying the decree.

When plaintiff purchased the property of Cook, he succeeded to his rights, but nothing more. Cook, or his heirs, had twelve months within which to redeem, and by the purchase of the equity of redemption he acquired that right. And, having failed to exercise it, and having been made a party to the suit to foreclose, and to the decree, his rights are barred, and the equity of redemption foreclosed. As the foreclosure was not strict, the defendants to the decree had twelve months, under the statute, within which to redeem, and creditors three months longer. But plaintiff in error, not being a

creditor, cannot claim the right longer than twelve months. *Ross* v. *Mead*, 5 Gilm. 171. No error is perceived in this record for which the decree of the court below should be reversed, and it is therefore affirmed.

Decree affirmed.

JOHN A. METCALF
v.
SMALLWOOD N. REDMON.

1. PARTNERSHIP—*as between the parties—what is not.* R., residing in Mississippi, made an offer in writing to M., a resident of Illinois, to form a co-partnership in the buying and selling of twenty horses, the same to be purchased by M. and sent to R., to be sold by him in Mississippi, which said offer M. accepted, and afterward in transacting the business, purchased twenty-seven horses, all of which he disposes of at other places, and without the knowledge of R., and a loss occurred,—*Held*, that M. could not maintain a bill as partner of R. for an accounting, or contribution for the loss sustained.

WRIT OF ERROR to the Circuit Court of Douglas county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was a bill in chancery filed in the Circuit Court of Edgar county, by the plaintiff in error, against the defendant in error, for an accounting and settlement of an alleged co-partnership between them. After the issues were closed, the case was sent by agreement to the Circuit Court of Douglas county, and there referred to a special commissioner to report the evidence, which, after being taken and reported, a hearing was had, and the court dismissed the bill, with costs to the complainant, to reverse which, a writ of error was sued out of this court.

The facts necessary to an understanding of this case, are fully stated in the opinion.

Mr. JAMES A. EADS, for the plaintiff in error.

Messrs. BALLARD SMITH, A. J. HUNTER, and JOHN SCHOLFIELD, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

A few obvious considerations will dispose of the case presented by this record.

It is claimed by the bill exhibited in this case, that a partnership existed between the plaintiff in error and defendant, to purchase horses in this State, and send them to a southern market for sale, the purchase to be on joint account, and the parties to be equal sharers in the profits and losses.

The proof of this partnership is alleged to consist in, and to have been formed by, letters passing to and from the parties, the first one containing the proposition, emanating from the defendant in error, and dated Canton, Miss., September 1st, 1858, and received in due course of mail by the plaintiff in error then residing at Paris, in Edgar county, in this State.

A resort to the letter of September 1st, 1858, written by defendant in error, is necessary in order to arrive at a knowledge of the kind of partnership said to have been formed.

In this letter, defendant says, he was too early in the market to sell his mules, but that there was a great demand for horses, which could be sold at large figures, and then says to plaintiff, "If you can buy twenty good work horses right, and send them by Harry and Joe, I think we can make a fine profit on them; or good saddle horses will sell well." * * * He then writes: "Now if you can and will buy them I am in half for every thing, and we will be full partners. Let me know immediately, and I can have them all spoken for. Ship them to Vicksburgh. Put them on a boat at St. Louis. If you can't buy twenty, buy me ten, and send them by Joe. I will need a hand very bad in a few weeks. If you can't buy them, show this to C. and T. L., let them buy some, for there is a good opening for a speculation in horses."

He adds this postscript: "Mr. John Metcalf, if you purchase any horses for I and you, give our note for the money, and if you buy for me alone, sign my name, and if you only buy ten, send them by Joe."

This letter was received by Metcalf on the 10th of Septem-

ber, and on the 13th of that month he wrote Redmon, acknowledging the authority to buy twenty good horses; that he had bought eight, and in a few days would have all he wanted, and asking Redmon to give him all the time he could to get the horses ready for market, that he was buying the horses in partnership, and would go equal parts in buying, and in profits and loss, etc.

This letter was received by Redmon about the 5th of October, and on the 6th, he wrote Metcalf thus: "You write me, that you have bought eight horses, and I expect by this time a good many more. I think that good saddle horses, and good single buggy horses will bring a fair price and sell quick. I know of five horses I could sell now," etc.; wants horses of fine size, and young ones at that, etc. He then states, that much sickness prevails there, and then adds, "don't buy any more horses unless you buy them very low. I think in one month, or six weeks, times will be a good deal better here, times and health will get better. There is a few horses and mules coming in every day, then I can't tell what we can do, but as you have the horses we must sell them; you must be your judge. So you may ship or drive them. You must be here in six weeks. If you ship them, you must ship them from St. Louis to Grand Gulf," where he would meet them any day; that if they came by land, he would meet them at Canton, and again directing, that Joe should come with them, and he thought he could sell them in a short time, but did not known what expenses twenty horses would be at.

The persons named Harry and Joe in these letters, are shown to be Harry Metcalf, a son of the plaintiff, and Joseph Redmon, a brother of the defendant.

This is all the evidence going to the fact of a partnership between these parties, and if one is established, it was special, and for a specific isolated transaction, and the field of its operations divided between this State and the State of Mississippi.

Other evidence introduced before the master shows, that the plaintiff in error, from the 11th of September to the 25th of October, bought twenty-seven head of horses for the concern,

and charged the cost, expenses, and his own services on books kept by himself, to the account of Metcalf and Redmon, showing, as he stated the amount, an outlay of $5,456.35, and proceeds amounting to $3,594.45, making a loss of $1,861.90. These horses were bought by the barter of a wagon, some lumber, goods and accounts from plaintiff's store and notes due him, no notes of Metcalf and Redmon having been given in a single instance. Fourteen of these horses were shipped on the 21st October, by plaintiff, to St. Louis, in charge of his son Harry and A. Stotts, and, on the 5th of November, the remaining thirteen. Joe was ready to go with them, but plaintiff did not accept his services. Stotts was instructed to sell the horses at St. Louis, unless plaintiff should otherwise order, and he was furnished with a list of prices in the event he might conclude to send them south to Redmon. Harry being in doubt where Redmon was, and there being a report of his death, sold twelve of the horses in St. Louis without loss, and shipped the remainder back to Paris, from which place they were, in March, 1859, shipped south by Metcalf. Stotts says, it was the intention to sell the horses in St. Louis at fair prices, and if they could hear from Redmon, to ship them south to him. The horses were called Metcalf's horses at St. Louis, and were shipped by rail from Paris to St. Louis, in the name of John A. Metcalf. It was proved by a Mrs. Mounts, that Metcalf told her that he was buying the horses for himself and no one else, and was buying them with old notes and accounts.

It was proved the horses could not have been bought as low with Metcalf and Redmon's notes, on time.

We are not disposed to give this fact any prominence in this case, for it is apparent if Metcalf was enabled to purchase the horses, without the use of his name and Redmon's, and on as good terms, it is not for Redmon to complain, even though it conferred a special benefit on Metcalf, by enabling him to convert property and notes and accounts belonging to, and due to himself, into horses, to be charged on joint account.

But we think the facts in this case show, if there was a partnership in the transaction, it was a partnership on certain

terms, with which Metcalf did not comply. In the first place, the partnership was in twenty horses, to be bought, and not a hoof more. Secondly, they were to be shipped or driven to Redmon, in the State of Mississippi. If shipped by the river, he would be at Grand Gulf, there to receive them; if taken by land, then he would be at Canton to receive them. The field of profit on the adventure was fixed by both parties in Mississippi, and the sale to be made under the eye and judgment of Redmon, assisted by the son of plaintiff, and by the brother of defendant, to whose joint care the horses were to be committed for that distant market. Thirdly, the horses were shipped by Metcalf, in his own name, to St. Louis, and were there called Metcalf's horses, and there twelve of them were sold in direct violation of the agreement of the parties. It was never in the contemplation of Redmon, that the market for the horses should be St. Louis, and the reason for making that place the market is not a valid one. It is in vain to say the son and Stotts did not know where Redmon was, for he had been most explicit in his directions at what point to land the horses. Had the plaintiff sent them, as directed, to Mississippi, then, as to twenty horses, Redmon would be liable, as a partner, for all losses on their sale; but selling twelve of them in a market for which they were not bought, and without the supervision of Redmon, was no compliance with the agreement. Again, the remaining thirteen were kept on hand at great expense, by Metcalf, after being returned from St. Louis, until March, 1859, and then taken south, by Metcalf, on his own account, but not to Redmon. The whole tenor of the correspondence between these parties shows, the horses were to be sent south immediately after their purchase, for a speedy sale; that they were to be sold in Mississippi, and the profit and loss then to be adjusted.

Had Metcalf acted on the agreement, as it was made, and according to its terms, then it might with strong reason be urged, that a partnership actually existed; that it was fairly "launched," and corresponding rights, obligations and duties then created. But the contrary appears, and no ground

remains on which the plaintiff's claim to have an account, can rest.

We are satisfied the Circuit Court decided correctly, in dismissing the bill, and we affirm the decree.

Decree affirmed.

WARREN FOWLES
v.
ISAAC VALLANDIGHAM.

VENDOR—*when cannot defeat his own sale by a subsequent acquisition of title.* Where a vendor sold chattels, which, at the time of such sale, he had no title to, but afterward acquired the title, and without having paid any new consideration therefor, he cannot, by virtue of such subsequently acquired title, defeat the sale to his vendee.

APPEAL from the Circuit Court of Jersey county; the Hon. DAVID M. WOODSON, Judge, presiding.

The facts in this case are stated in the opinion.

Messrs. WARREN & POGUE, for the appellant.

Messrs. A. L. & R. M. KNAPP, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of replevin, brought by Fowles against Vallandigham, and growing out of the following facts: In March, 1864, Billings & Parsons, as joint owners of certain land in Jersey county, sold it, by a verbal contract, to Fowles, who agreed to pay $2,000 on the 1st of November, following, and to execute, at that time, his notes for the residue of the purchase-money. Fowles took possession and cut from the land a considerable quantity of cord-wood and staves, without, however, procuring the consent of either Billings or Parsons. Fowles failed to comply with his contract, and, in January, 1865, Billings & Parsons sold and conveyed the land to John

and Thomas Lock. One Bernard, who is not a party to this record, was in partnership with Fowles in cutting the wood and staves, and, on the 29th day of December, 1864, acting in the name of the firm of Fowles & Bernard, he sold the same to the defendant Vallandigham. A part of the staves and wood had been hauled by Fowles & Bernard to the landing, near Randolph, on the Mississippi. Bernard gave Vallandigham a bill of sale in the name of the firm, acknowledging the receipt of $300 in payment, and concluding in these words: "This lot of stuff is only subject to the chopping and stave making bills, and any claims that the owners of the land, other than us, may have upon them." When Billings & Parsons sold the land, in January, 1865, they received the same price which Fowles had agreed to pay, and in view of this fact, and because Fowles had made some improvements on the land, they gave him the cord-wood and staves. He then replevied them from Vallandigham, and judgment having gone against him in the Circuit Court, he brings the record here.

It is insisted by the counsel for Fowles, that the clause above quoted from the bill of sale, is to be regarded as a stipulation, that they sold the property subject to the title of Billings & Parsons, and therefore, that there was no warranty against that title, and that they or either of them had the same right to acquire that title which a third person would have had, and to assert it as against their vendee.

Whether this would be true, if Fowles had subsequently acquired the title of Billings & Parsons for a new consideration, and independently of his contract made with them in the preceding March, is a question not necessary to be decided. Billings & Parsons undoubtedly owned the property, and if they had chosen to assert their title, and thereupon Fowles had bought it from them, perhaps the result contended for by his counsel would have followed. On that point we express no opinion. But as a matter of fact, they asserted no title, and made no claim to the property, and Fowles did not acquire it from them by any new contract. There is no conflict of evidence on this point. The only witness is Mr. Billings, who

acted throughout for Billings & Parsons, and it appears by his testimony, that inasmuch as they lost nothing by the failure of Fowles to comply with his verbal contract of purchase, and as he had made some improvements on the land, which they did not wish to appropriate for nothing, Mr. Billings thought proper when he sold the land to the Locks in January, to recognize Fowles as having an equitable title to the wood and staves, and therefore, in the language of the witness, he "gave" Fowles this property. Mr. Billings properly enough speaks of the transaction as a "gift," but he explains the inducement to it as we have above stated. It simply amounted to this, that inasmuch as Fowles had, under a contract of purchase, made improvements on the land, of which Billings & Parsons were receiving the benefit in their sale to Lock, they would refrain from asserting their legal title to the wood and staves. Fowles had no equity under his verbal contract, which the law would protect, and Billings & Parsons were under no legal obligation to recognize him as having any interest in the wood, but in a spirit of liberality they thought proper to do so. In consideration of improvements that must have been made by him before he and his partner sold the wood and staves to Vallandigham, they chose to treat him as having an equitable claim upon them, and forebore to assert their title to this property. This equity, such as it was, and which we call an equity because Billings & Parsons thought proper to treat it as such, was in existence when Vallandigham bought, and passed to him, and he, and not his vendors, should receive the benefit of its recognition by Billings & Parsons. Suppose Fowles had paid $500 on the land in March, 1864, and had executed what is called a forfeit contract, and gone into possession without leave, cut wood, and sold it, with the same proviso in the bill of sale that we find in the one before us. Suppose, further, on his failure to make his second payment, Billings & Parsons had pronounced the contract forfeited and re-sold the land, but had said to Fowles, that in consideration of the $500 paid by him, he might have what wood he had cut. Can it be pretended, that thereupon Fowles, under pretense of having acquired a new title, which would

not inure under the language of the bill of sale, could recover from his own vendees the wood he had sold them? The law can tolerate no such double dealing, and this hypothetical case does not differ in principle from the one at bar.

Mr. Billings in his testimony states the circumstances as follows:

"In consideration of the sale of the land to said Locks for the same price ($20 per acre) and for a further consideration that Fowles claimed for improvements made on said land, and not wishing the benefit of Fowles' labor, we gave to him at the time the deed was made to the Locks, all the cord-wood and staves that had been cut off the S½ of section 23, and hauled to the landing at Randolph, on the Mississippi river, and also all the staves that were on the said S½ section 23 at that time."

By the proviso in the bill of sale, the wood and staves were sold, subject to the claims of the owners of the land. They forebore to assert their claim, except by the recognition of that same title in Fowles, which he had already sold to Vallandigham. There is no controversy in regard to the facts, and the judgment of the court below is so clearly right, that we do not deem it necessary to consider whether there was a technical error in the instructions.

Judgment affirmed.

NATHAN CLEARWATER *et al*

v.

JAMES KIMLER *et al.*

1. DEED—*mental weakness of grantor.* Where a bill is filed by a part of the heirs of a deceased person, to set aside a deed of conveyance to another heir, on the ground, that the grantor was mentally too weak and imbecile to be capable of executing such an instrument, and it appears from the evidence, that he manifested prudence and judgment in determining the best mode of having the conveyance take effect after his death, it will not be presumed, that he was mentally too weak to execute such a conveyance.

2. SAME — *consideration.* Where a father-in-law makes a deed to his son-in-law, to be held as an escrow until after the death of the grantor, before delivery, with the agreement, that the grantee pay a price fixed by them, and that the grantee and wife shall reside near him, and he shall render assistance and contribute to the comfort of the grantor and his wife so long as they live courts will not be rigid in scrutinizing the relative value of the property and the money paid as the consideration. The owner of property has the legal right to dispose of it as he may choose, and may distribute it among his children during his life, instead of by will, and if in doing so, he makes a part of his heirs the recipients of his bounty beyond others, the remaining heirs have no legal right to complain.

3. SAME — *mistake — corrected in equity.* Where, in preparing a deed for execution, the scrivener misdescribes the property, when made satisfactorily to appear, a court of equity will correct the mistake and reform the deed.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was a suit in equity, brought by Nathan Clearwater and a large number of other persons, the heirs of Reuben Clearwater, in the McLean Circuit Court, against James Kimler, Jane Kimler and John Buener. The bill was filed for the purpose of setting aside a conveyance from Reuben Clearwater, deceased, to James Kimler, upon the alleged ground, that the grantor was weak and imbecile in mind, easily influenced, and that he had made the deed by yielding to improper importunities, and that the consideration paid was grossly inadequate to sustain the deed. It appears, that Kimler was his son-in-law, and that Jane Kimler, the wife of the former, was his daughter; that grantor was anxious to have his son-in-law and daughter near him, and it seems to have been agreed, that Kimler should purchase the land in controversy, and pay therefor $945; but, by a subsequent arrangement, the consideration was fixed at $1,425, for the sixty-five acres in dispute.

It also appears, that Kimler and wife were to render aid, assistance and care to Clearwater and wife during their lives. That Kimler and wife performed this part of the agreement.

That the grantor directed a justice of the peace to prepare a deed of conveyance for the land to Kimler, which was to be held as an escrow, and only to be delivered on the death of the

grantor. But the justice of the peace, in preparing the deed, misdescribed the lands, and the mistake was not discovered until after the deed was executed. Kimler filed a cross bill, to have the mistake corrected.

On the hearing there was much conflicting evidence as to the mental condition of the grantor, as well as the value of the land. But the evidence of the mistake in the description of the premises in the deed was clear.

The cause was heard on the bill, answers, replications, the cross bill, answers, replications, exhibits and proofs, and the court below dismissed the original bill, and granted the prayer of the cross bill, and decreed the correction of the mistake in the deed. Complainants, to reverse that decree, bring the case to this court on appeal, and assign the rendition of the decree for error.

Messrs. WILLIAMS & BURR, for the appellants.

Messrs. TIPTON & BENJAMIN and Mr. W. H. HANNA, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This record presents questions of fact only, for determination. Appellants insist, that it appears from the evidence, that Rueben Clearwater was, when he executed the deed to the land in controversy, so imbecile and weak in mind, as to render the conveyance inoperative and void. That the consideration paid for the land was so grossly inadequate as to require the interposition of a court of chancery to cancel it, and that the facts fail to prove that the conveyance was ever consummated, and that even if a mistake in the description of the property is proved to have been made, the court should refuse to correct it, and reform the deed.

It appears, that the conveyance was executed by the grantor to his son-in-law. That in 1849, Clearwater conveyed to him one hundred and two and a half acres of land adjoining the

tract in controversy, at eight dollars per acre. Afterward he conveyed to Kimler one acre, on which the latter erected his dwelling-house, for eight dollars. It also appears, that Clearwater, on the 7th of January, 1865, directed a justice of the peace to prepare a deed of conveyance for the balance of his homestead to Kimler, embracing sixty-five acres, at twenty-five dollars per acre. It seems, that this deed was intended to include the one acre previously conveyed. The justice of the peace prepared a deed, which was duly executed, and delivered to the justice of the peace, to hold as an escrow, pursuant to this provision in the deed: "It is positively the agreement between the parties to this deed, that the said Reuben Clearwater is to retain possession of the land above described, and have the use thereof until the day of his death; and that this deed is not to be delivered to the said Kimler until after the death of the said Clearwater." It appears, that the justice of the peace made a mistake in the description of the land.

There was a large amount of evidence heard touching the mental condition of the grantor, but when it is all considered, we are clearly of the opinion, that it wholly fails to establish the fact of mental weakness, such as should invalidate this conveyance. He seems to have been fully aware of the nature and consequences of the transaction. He proposed to the justice of the peace, that it should be evidenced by a bond, but on the suggestion of the latter, adopted this mode of making a deed, and only delivering it as an escrow, to take effect after his death. He thus manifested a degree of prudence that rebuts mental weakness. Again, when complaint was made, that he had sold this property too low, he asserted the right to dispose of his property as he might choose. This would seem to repel the presumption, that he was yielding and easily influenced by others. We perceive no marks of mental weakness, although the evidence may show, that his memory of recent events was not so good as it had formerly been. On the whole of the evidence we are fully satisfied, that he was entirely capable of disposing of his property, and that the transaction should not be disturbed for that reason.

As to the inadequacy of price, there is, as always will be, a conflict of testimony. When a value has to be determined by the opinions of witnesses, we always find, that there is great controversy as to the true worth of property. But when all of the evidence contained in this record is considered, it fails to prove that the price is grossly inadequate. The property was no doubt worth more than the consideration named in the deed. But subsequently it was agreed, that it should be raised from $945 to $1,425. This latter sum was doubtless less than the property could have been sold for in the market. But it must be remembered, that Kimler and his wife contributed to the comfort of her father and mother, by rendering them assistance and attention for many years, for which no charge was ever made, or most likely ever intended to be. He, no doubt, desired to have his daughter and son-in-law near to him and his wife, in their declining years. And in the informal arbitration, the arbitrators, neighbors, knowing all of the circumstances, determined that Kimbler was entitled to $500 for his assistance to his father-in-law. It is true, that they also thought he should pay thirty-five dollars per acre. If that be adopted as a basis for a settlement, he only obtained the land for $350 less than it was worth.

Again, the evidence shows, that there was some kind of a verbal understanding when the first conveyance was made to Kimler, that he was to have the balance of the tract at eight dollars per acre; and that Kimler and his wife were to take care of Clearwater and his wife during their lives. From the evidence in the case, we have no doubt, that Clearwater intended the aid that Kimler rendered him in his business, and the care and assistance he and his wife extended to him, should form a part of the consideration; and we are satisfied, that it, together with the price agreed upon, was amply sufficient to sustain the conveyance. Again, where, as was perhaps true in this case, a father or father-in-law disposes of property by way of advancement or distribution to his children, during his life, instead of by will, courts will not be as rigid in considering the adequacy of the consideration paid as if the transaction was

with strangers. As the grantor said, he had the legal right to dispose of his property as he chose, and if he saw proper to make this son-in-law and daughter the recipients of his bounty, the other children have no grounds of complaint. He seemed to prefer their care and assistance to that of others, and to have been liberal in rewarding them for it.

When the evidence is considered, we can have no doubt, that the justice of the peace who drew the deed, by mistake, inserted the wrong numbers. He speaks of it with confidence, and seems to be clear and distinct in his recollection of the transaction. We think his evidence leaves the case free from doubt, that a mistake was made in the description, and that the land intended to be conveyed was omitted in the deed. We are, for these reasons, of the opinion, that the court below did not err in dismissing appellants' bill, and in decreeing the relief prayed in appellee's cross bill. The decree of the court below is therefore affirmed.

Decree affirmed.

WILLIAM COULTAS, impleaded, etc.,

v.

LYNN L. GREEN.

1. STIPULATIONS—*binding force of.* Where the parties to a suit, enter into a stipulation, and agree, that a decree shall be entered therein according to the case made by the pleadings, and that said decree shall be entered of the term at which said agreement was made,—*held*, that, the agreement being a mutual one, neither party could take any further steps in the cause, and that a decree should have been entered in conformity with it.

2. SAME—*verbal agreement to dismiss suit.* This court has held, in a suit at law, that a verbal agreement between the parties to dismiss the suit, must be complied with.

APPEAL from the Circuit Court of Mason county; the Hon. JAMES HARRIOTT, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. MORRISON & EPLER for the appellant.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The appellant, Coultas, and appellee, Green, who, by his bill in chancery, in the Mason Circuit Court, was seeking to set aside a sale of certain lands made by the sheriff of that county, and of which Coultas had become the purchaser, and who, with others, was made defendant to the bill, and had filed his answer, while the bill was pending, and the cause at issue by a replication put in to the answer, entered into this stipulation, which was filed in the cause and made a matter of record therein:

"LYNN M. GREEN, Complainant, *v.* WILLIAM COULTAS, THEODORE L. COOPER and WILLIAM DWYER, Defendants.	In Chancery.

"It is hereby agreed and stipulated by and between the said complainant, Lynn M. Green, and the defendant, William Coultas, that the sum due the said Coultas to this date on the two notes assigned to and held by him, as stated in the bill and answer filed in said entitled cause, is $4,947.50, and the sum due the said Green to date on the note assigned to and held by him as stated in said bill and answer, is $2,035, and it is further agreed and stipulated, that a decree be rendered in said cause at this term of court, setting aside and annulling the sheriff's sale of the real estate to the said Coultas, mentioned in said bill and answer, and also annulling and vacating the deed of conveyance made by the sheriff, conveying said real estate to said Coultas, referred to in said bill and answer, and that the said decree order the said Theodore L. Cooper, at a short day, to be fixed in said decree, to pay to the said Coultas and to said Green, respectively, the above mentioned sums, as above stated, and, in his default thereof, that the master in chancery of said county be ordered and directed, upon due notice given, to sell said real estate, to raise money to pay said sums so due on said notes, and that said mortgage be foreclosed

in favor of said Coultas and said Green, and that, after the payment of the costs in this cause, said master in chancery be ordered to apply the proceeds of said sale to the payment of said several sums so due on said notes, to this date, together with interest thereon, at six per cent per annum, from this date, according to the equitable rights and priority of lien of the parties to this stipulation in and to said mortgaged premises, as if the sale, the vacating of which is herein provided for, had never been made, which equitable rights and priority of lien and payment, shall be submitted to this honorable court, to be determined by the court in vacation, and decree to be rendered as of this term of court; right of appeal reserved to either party to this stipulation, by filing bond within sixty days after signing of decree, in such amount as may be required by the judge of this court in vacation, with security to be approved by said judge, and either party may furnish said court with brief of authorities before decree rendered. June 27, 1866."

On the following day, June 28th, Green took a default against Cooper and Dwyer, and at the same time entered the decree and made the reference to the master as stipulated. At the October Term following, Green entered his motion for leave to dismiss his bill, to which Coultas objected, and moved for a decree in pursuance of the stipulation, but the court allowed Green to dismiss his bill, to which Coultas excepted and prayed an appeal.

The errors assigned question the correctness of this action of the court.

The question is submitted *ex parte*, appellee failing to join in error.

We think there can be no doubt as to the meaning of the stipulation filed. It is for a decree in the cause pending, and to be entered at the term at which the agreement was made. On making this agreement and filing it, and making it a part of the record, the appellee yielded all power over the case. The agreement was mutual also, and prevented appellant from taking any further steps in the cause.

This court, in a suit at law, compelled the parties to abide by a verbal agreement to dismiss the suit. *Toupin* v. *Gargnier*, 12 Ill. 79.

It is equitable, just and right, that appellee should comply with his agreement, and that a decree should be entered in conformity with it.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree according to the stipulation filed.

Decree reversed.

HENRY GREEN *et al.*

v.

HENRY SPRING.

1. CHANCERY—*courts of—have no jurisdiction, in cases to recover possession of land held adversely.* A bill in chancery cannot be maintained, which simply seeks to recover the possession of land held adversely. In such a case, a court of equity has no jurisdiction.

2. SAME—*in what cases equity will so decree.* A court of chancery will only decree an adverse claimant to deliver possession to the rightful owner, when such relief is incidental to the main object of the bill, and when the power of the court has been invoked for some purpose that belongs to its legitimate jurisdiction.

WRIT OF ERROR to the Circuit Court of Richland county; the Hon. AARON SHAW, Judge, presiding.

The facts in this case are fully stated in the opinion of the court.

Mr. J. G. BOWMAN, for plaintiffs in error.

Messrs. HAYWARD & KITCHELL, for defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery for dower and partition, filed in October, 1864, by Henry Green, and Elizabeth M. Green, his

wife, alleging, that on the 20th of August, 1843, one Asahel L. Powers died seized in fee simple of two lots in the town of Olney, leaving said Elizabeth his widow, and without lineal descendants; that the said Elizabeth, in August, 1845, intermarried with one Henry Green, and that she is entitled to an undivided half of said real estate in fee, and a right of dower in the other half; and that said lots were held under claim of title by one Henry Spring, who was made defendant to the bill. Elizabeth M. Green died pending the suit, and her heirs were made parties, and so much of the bill as prayed dower was dismissed by complainants.

After the bill, so far as it related to dower, was dismissed, there was nothing left upon which the jurisdiction of a court of chancery could be maintained. It became in substance, simply an action of ejectment. The defendant, Spring, was in possession, claiming title to the entire lots under a sale made in 1845, by the administrator of Powers, for the payment of debts.

If this sale, as alleged by the complainant, was illegally made, and one undivided half of the lots belonged to the heirs of Mrs. Green, the other half belonged to the heirs of Powers, who are not parties to this proceeding, and not to the defendant. If he has any interest in the lots, he owns the entirety. This bill professes to be for dower and partition. The claim for dower is abandoned, and the only persons with whom partition can be made are not parties. So far as Spring is concerned it stands a naked bill to turn him out of possession of land adversely claimed by him, and to compel an account of rents and profits. If this bill can be maintained, we are at a loss to perceive why a bill in chancery can not be maintained in every instance to recover possession of land adversely held. It is not as if the bill were filed to set aside the administrator's sale for fraud. No fraud is alleged, nor other head of chancery jurisdiction. Indeed, in the bill it does not appear that there has ever been an administrator's sale. It is merely alleged that Spring is in possession claiming adversely, and that complainants know of no title which Spring has to any part of the lots; but that if he

has any it is only to one-half. In the answer, Spring sets up the title claimed by him under the administrator's sale, which is attacked in the argument, on the ground that there was no jurisdiction in the court to make the order, for want of notice. But the bill was not filed to set this sale aside, and when set up in the pleading and proof of defendant, it is insisted that it was void. The bill was properly dismissed, as a bill of partition for want of proper parties, and, so far as it sought to evict an adverse claimant without title, there was nothing, either in the bill or proofs, to give the court jurisdiction. A court of chancery will sometimes decree an adverse claimant to deliver possession to the rightful owner, but only when such relief is incidental to the main object of the bill, and when the power of the court has been called into action for some purpose that belongs to its legitimate jurisdiction.

Decree affirmed.

ELLEN B. CLELAND
v.
WILLIAM T. FISH *et al.*

TRUSTEE—*what constitutes.* The mere fact, that a purchaser is the son in-law of the grantor does not constitute the purchaser a trustee of the vendor. And when it appears, that the vendor and vendee while on friendly terms were not intimate, and when the purchaser had not acted as the agent or business adviser, and it does not appear, that the vendor said any thing which implied that she relied upon the vendee to act as her agent in the matter, it will not be presumed, that such confidence was reposed as required the purchaser to disclose the fact, that he had superior knowledge of the value of the property, or that he was authorized by the remaindermen to offer more than he gave for the life estate of the vendor in the property.

APPEAL from the Circuit Court of Morgan county; the Hon. D. M. WOODSON, Judge, presiding.

This was a bill in chancery, filed in the Morgan Circuit Court, by Samuel Cleland and Ellen B. Cleland, against Wil

liam H. Gest, Martha V. Fish, W. T. Fish, Servis Hatfield, Anna J. Cassell, Charles Cassell, Susan Cassell, Catharine R. Cassell and James Berdan. The bill alleges, that complainant, Ellen, was the widow of Nathan H. Gest, and that, as such, there had been assigned to her as dower in her late husband's estate, lot sixty-three in Jacksonville, Illinois, with other property, to hold for life. That the buildings on the lot were in a dilapidated condition, yielding not more than $100 rent. That the owners of the remainder were desirous of partition of the premises. That in January, 1859, W. H. Gest, Servis Hatfield, J. J. Cassell and W. T. Fish, representing their own and the interests of the other heirs, had a conference at Jacksonville, with reference to a speedy division of the real estate, which had decended to them from N. H. Gest.

That complainants were residing in Rock Island, and did not know the value of the lot. That defendants at the conference had concluded, that the life estate of complainants was worth $2,600, or $2,800; that it was their interest to induce Mrs. Cleland to sell, or to agree to a sale, and receive a portion of the purchase money; that Fish was deemed the most suitable agent to negotiate with her, and that he was authorized to give her one-half of what the lot could be sold for, if she would join in a sale, or $2,600 or $2,800 for her life estate.

That he went to Rock Island for the purpose, and falsely and fraudulently concealed the fact, that her life estate was worth $26,000 or $28,000, and that he was authorized to offer her that sum, or one-half of what could be had on the sale of the property. That he represented, that her interest in the property was not worth more than $800, and the property could not be sold without the consent of all of the owners of the remainder.

That Fish was her son-in-law; that her confidence superinduced by the relationship, continued and increased until the date of the sale, and that she believed he was truly and unselfishly promoting, as he best could, her pecuniary interest, and of which confidence he was aware. That he offered, and she accepted, $1,000 for her life estate, and that she and her husband executed a deed of conveyance.

That in February, 1859, proceedings for partition were commenced in the Morgan Circuit Court, by Fish and others, in which a decree was rendered, that the premises be sold, and that the annual interest on the net proceeds of the sale be paid to Fish, during the life of Mrs. Cleland, and on her death, the money be divided among those owning the remainder. The premises were sold for $7,680.00, and Berdan, a special master, holds the funds. The bill prays an injunction against further payments to Fish, and that Berdan be decreed to pay the interest to Mrs. Cleland, and general relief.

The defendants' answered, and replications were filed. The death of Samuel Cleland was suggested. A hearing was had on the bill, answers, replications and proofs, and the court rendered a decree denying the relief sought, and dismissing the bill. And to reverse that decree complainant brings the case to this court on appeal.

Mr. HENRY E. DUMMER, for the appellant.

Mr. H. B. MCCLURE and Mr. I. J. KETCHAM, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

When this case was previously before this court, the decree of the court below was reversed, and the bill dismissed. 33 Ill. 238. At a subsequent term of the court the decree of dismissal was modified, so as to make a dismissal without prejudice, that appellant might, by a new bill and proofs, establish such a relation of confidence and trust as rendered the concealment of the fact, that the remaindermen were willing to give a larger sum than was paid to Mrs. Cleland, for her life estate in the premises. This bill was afterward filed, and it is charged, that Fish was the son-in-law of complainant; that her confidence, naturally superinduced by the relationship, continued and increased until the date of the sale; that she reposed entire and implicit trust and confidence in him, believing that he was truly and unselfishly promoting, as he best could, the pecuniary

interests of complainant, and that he was well aware that she reposed such confidence.

The bill also charges, that before going to Rock Island to purchase her interest, Fish knew that the remaindermen had, upon consultation, authorized him to offer complainant $2,600 or $2,800, for her life estate, or, at her option, one-half of what the property could be sold for, by uniting her title to the fee, and that he fraudulently concealed these facts from her, and represented that her interest was not worth more than $800, and that the property could not be sold without the consent of all the owners, and that Hatfield, who owned two-fifths, was unwilling to sell. That by reason of these misrepresentations, and the concealment of these facts, she was induced to sell her life estate to Fish for one thousand dollars.

When the case was formerly before the court, it was held, that the fact that a person occupies the relation of son-in-law to the vendor, does not impose the legal duty of disclosing his knowledge of the value of the property, but, to have that effect, it must appear, that such a relationship occasioned, and such a trust grew out of it, that authorized appellant to act upon the presumption, that there had been no concealment of any material fact from her.

The evidence discloses the fact, that the parties resided remotely from each other; that, while the social and family relations existing between the families were good, and had been uninterrupted, from their separation but little intercourse had occurred between the families. Nor does it appear that Fish had ever acted as the agent of appellant, in this or any other business, or had ever been her confidential business adviser, or that she had ever intrusted him with the management of her business affairs. Nor does it appear, that he had agreed, in this case, to ascertain the value of her life estate, or the sum for which it could be sold. Had any of these facts been shown, then the trust and confidence might have been inferred, which would render it inequitable to fail to make the disclosure. But, when all of the facts are attentively considered, we do not see that the case is at all strengthened, as it

now only amounts to the claim, that he was her son-in-law, and that relationship imposed the duty of disclosing these facts, which we have seen does not in law impose it; nor can we infer, from that fact alone that such confidence was reposed.

The witnesses, it is true, state that appellant seemed to have confidence in him, and they give it as their opinion, that it was by reason of that confidence that she sold the property to him. The same may, no doubt, be truly said in every case where mutual friends trade, and the purchaser fails to disclose his superior knowledge of the value of the property. It does not appear, that appellant, at any time during the negotiation, said to him that she relied upon him, owing to the relationship, to truly disclose all of the facts, and that she only sold in consequence of such confidence reposed in him. Had she done so, the case might have been different. We think that the case, as now presented, is substantially the same as when here before; that the legal principles which must govern it are not different, and that the appellant has still failed to show herself entitled to the relief sought.

On the question of fraudulent misrepresentation, the case is substantially the same, and we deem it unnecessary to again discuss the evidence. The decree of the court below is affirmed.

Decree affirmed.

Mr. JUSTICE LAWRENCE dissenting.

THE PEOPLE OF THE STATE OF ILLINOIS
v.
JAMES N. MCCALL *et al.*

NATIONAL BANKS — *shares of stock in, exempt from taxation.* The action of a board of supervisors, in abating taxes levied under the laws of this State, upon shares of stock in national banks, will be affirmed by this court, in accordance with the decision of the Supreme Court of the United States in the case of *Bradley* v. *The People of the State of Illinois*, 4 Wallace, 457.*

* NOTE BY THE REPORTER. After this decision was rendered, the legislature was called together by the governor, for the purpose, among others, of enact-

This cause was brought into this court by the auditor of State. It appears from the record, that the assessor of the town of Canton, Fulton county, assessed for taxation, at half their nominal value, for the year 1865, the shares of stock of the First National bank of Canton, located in that town and county; that, upon the application of the shareholders to the board of supervisors of Fulton county, in September, 1865, the board abated the assessment. The auditor had no notice of the action of the board, and the shares of the stock of the bank were wholly omitted from the assessment list for that year, and thus escaped taxation. The county clerk of Fulton county, in 1866, in accordance with the law respecting property not assessed, entered the shares of stock on the assessment list at their full value, and charged against them State, county and other taxes, for the year 1865. The town assessor listed the shares for 1866 at one-half their nominal value, but the county clerk, with the consent of the assessor, raised the assessment to the full value of the shares.

The shareholders of the bank again appealed to the board of supervisors for an abatement of the assessment for 1865, and for so much of the assessment of 1866, as exceeded the amount fixed by the assessor, which was granted.

Mr. C. M. MORRISON, State's attorney, for the people.

Mr. G. BARRERE, for the defendants.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an appeal by the auditor of public accounts from an order made by the board of supervisors of Fulton county, releasing from an assessment for taxation for the years 1865 and 1866, of shares in the capital stock of the first national bank of Canton. It is a case, the same in principle with the case of *The People* v. *Bradley et al.*, 39 Ill. 130, in which this court held, that the shares of stock held by Bradley in the capital

ing a law, under which capital invested in national banks might be taxed. See Gross' Stat. 576, 612. Act June 13, 1867, Sess. Acts of Special Sessions, p. 6

stock of a national bank, constituted his interest in the bank, and was liable to assessment and taxation under the law of this State. That the shares made up the capital stock, and the result was the same, whichever was taxed.

In the opinion pronounced in that case, it was endeavored to be shown, and, on reflection, we think successfully, that it was matter of contract and agreement between the banks and the people, that the shares should be deemed personal property, and be liable to taxation by the State, and such contract was not affected by the forty-first section of the national banking law of June, 1864.

This case was taken by writ of error to the Supreme Court of the United States, and on the authority of the case of *Van Allen* v. *The Assessors*, 3 Wallace, 584, it was held, that admitting a tax on the capital was equivalent to a tax on the shares as respected the shareholders, yet as the capital of the banks may consist of the bonds of the United States, which are exempt from taxation, it was not easy to see, that the tax on the capital was an equivalent to a tax on the shares. *Bradley* v. *The People*, 4 id. 459. The judgment of this court was reversed, and the decision of the board of supervisors affirmed.

In accordance with that decision, the order of the board of supervisors of Fulton county, releasing the shareholders of the first national bank of Canton from the taxes assessed upon their shares, must be affirmed.

Judgment affirmed.

DAVID T. BONNELL

v.

JOSHUA NEELY.

1. STATUTES — *act of* 1845 — *concerning stay of proceedings out of term — who entitled to.* Section 46, of the practice act of 1845, authorizing "a party" out of term, intending to move to set aside or quash any execution, replevin bond, or other proceeding, to apply to a judge at his chambers, for an order staying proceedings, as preliminary to a motion to be made in term time, to

quash the same, applies only to "a party" to the proceedings sought to be quashed.

2. SAME — *not intended for persons not parties to the proceedings.* Persons who are not parties to the proceedings thus sought to be set aside, cannot, by the summary means of a motion, assert adverse rights. Such rights can only be adjusted by the aid of regular proceedings.

3. SAME — *abuse of process.* Under this statute, where there has been an abuse of the process, as between the parties to the proceedings, this summary remedy, by motion, is allowed; but strangers to the proceedings cannot assert their rights in this manner.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. DAVID M. WOODSON, Judge, presiding.

This was a proceeding instituted in the court below, by Joshua Neely, the appellee, under the forty-sixth section of the practice act of 1845, asking for an order to stay an execution issued on a judgment in favor of David T. Bonnell, the appellant, against one Philip English. The single question presented by the record is, whether the statute authorizing this summary remedy, can be resorted to by a person who is not *a party* to the proceedings sought to be quashed. The facts in the case are fully stated in the opinion.

Mr. JAMES W. ENGLISH, for the plaintiff in error.

Messrs. WARREN & POGUE, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

Neely, the appellee, was the purchaser of certain real estate under a decree foreclosing a mortgage executed by one English. Bonnell, the appellant, obtained a judgment against English subsequent to the mortgage. An execution was issued on the judgment, and levied on the mortgaged premises, on the 4th of March, 1864, and on the 14th of May, 1864, they were sold to Bonnell. This sale was set aside at the April Term, 1866, as irregular, and a *vend. exp.* was issued directing the sheriff to sell the lands hitherto levied upon. Under the *venditioni* the sheriff proceeded to sell, on the 2d day of June,

1866. Bonnell was the purchaser, and the sheriff treated the amount of his bid as a redemption from the sale to Neely, under the foreclosure, made April 29, 1865, and gave him a certificate of redemption. The sheriff offered Bonnell a deed, which he declined, and directed the sheriff to resell. This the sheriff was about to do, when Neely applied to the circuit judge in vacation for an order staying further proceedings on the part of the sheriff.

However irregular these proceedings may have been, and they were certainly a departure from the statute prescribing the mode in which judgment creditors shall redeem, the appellee has mistaken his remedy. This proceeding was instituted under section forty-six of the practice act authorizing a "party" to apply to a judge in vacation, for an order staying proceedings as preliminary to a motion to be made in term time to quash the writ or other proceedings. This clearly refers to a party to the "execution, replevin bond or other proceedings," which it is sought to quash. The statute can never have been intended to authorize third persons to assert adverse rights by the summary means of a motion and have them adjusted without the aid of regular pleadings. If this proceeding can be sustained, then we should be obliged to hold that the claimant of personal property which has been levied on under an execution to which he is not a party, may have his title tried by means of a motion instead of being driven to an action of replevin or a trial before a jury of the right of property. We cannot hold this. When process is abused, as, for example, if the execution has been paid to the sheriff, and he still proceeds to sell, it is very proper that as between the parties this summary remedy should be allowed. But that strangers should be allowed to have adverse and often complex rights settled in this mode is inconsistent with the spirit of our law. The judgment of the Circuit Court must be reversed and the petition or motion of Neely dismissed without prejudice to him in any future proceedings.

Judgment reversed.

Syllabus. Statement of the case.

ALLEN BRISCOE *et al.*
v.
JOSEPH S. ALLISON *et al.*

1. CONSTITUTION—*law authorizing bounties to soldiers.* An act of the general assembly authorizing a county to give bounties, and to levy a tax for their payment, to induce persons to enlist in the military service, to avoid a pending draft, is held to be constitutional.

2. BOUNTIES—*offered without legal authority.* Where a county offered a bounty to persons who might volunteer, be drafted, or furnish substitutes for the military service, who should be received and credited to some town in the county, whose *quota* was not full, in the absence of statutory authority to do so, such act is unauthorized and void.

3. SAME—*given under the offer after law authorized payment of.* Subsequently to such offer, the general assembly authorized the county to pay such bounties for enlistments, and county orders, to pay them, were issued after the passage of this law, and before any further action was taken by the county authorities. *Held*, that such orders were authorized by the law, but all bonds issued before the passage of the law are invalid, and cannot be enforced against the county.

4. SAME—*unauthorized to persons furnishing substitutes.* Where the board of supervisors offered to pay a bounty to persons who might be drafted, or had furnished substitutes, and the legislature had conferred no such power,—*Held*, that county orders issued to pay such bounties are invalid, and cannot be enforced.

5. INJUNCTION—*to stay collection of tax.* Where a bill is filed to stay the collection of a tax levied to pay county orders issued for bounties, a portion of which are authorized, and a portion unauthorized by law, the court should ascertain the amount the unauthorized bear to those authorized, and reduce the levy by the proportion the former bears to the latter, and require the remainder to be collected and applied to the payment of those legally issued.

WRIT OF ERROR to the Circuit Court of Clark county; the Hon. CHARLES H. CONSTABLE, Judge, presiding.

This was a bill in chancery, filed by Joseph S. Allison, John Bartlett, Frederick Quick, William McKeen, Robert Houston, Stephen Archer, William Keelmen, Henry T. Rautt, William B. Leslie, James McCabe, Franklin Mark and William Reddick, in the Clark Circuit Court, against Allen B. Briscoe and

Charles Stroever, to restrain the collection of a tax levied on property in the town of Marshall, in that county.

The bill alleges, that the board of supervisors of the county, on the 28th day of January, 1865, passed a series of resolutions by which the county offered a bounty of $400 to each person who would volunteer, and be accepted into the military service, and be credited to the quota of the county. Also, a like bounty to all such persons who might be drafted, and should furnish a substitute accepted into the service on such quota.

On the 7th day of January, 1865, the general assembly adopted an act applying to Clark, and some other counties, by which the county authorities were empowered to levy a tax for bounties to be paid to persons enlisting in the military service of the United States.

At the March Term, 1865, the board of supervisors passed resolutions confirming those adopted in January, and offering a like bounty to any person who might enlist, or be drafted, or who might, after being drafted, furnish a substitute, who should be received into the service on the quota of any town in the county. The clerk of the County Court was authorized to issue a county order for that sum, to each person coming within the provisions of the resolutions.

It appears, that a number of such orders were issued after the adoption of the order in January, and before the passage of the law in February. That others were issued after the adoption of the law, and before the passage of the resolutions at the March Term. Still other orders were issued after the adoption of these latter resolutions, and there were a few orders issued to drafted persons.

The board of supervisors laid a tax on the taxable property of the county, to raise a sufficient fund to redeem these county orders. The tax was extended upon the collector's books, which were placed in his hands for collection, and he was about to enforce the same, when this bill was filed to restrain him therefrom, upon the alleged ground that the levy was illegal and void.

A temporary injunction was granted. Answers were filed,

and replications thereto. A hearing was had on the bill, answers, replications and exhibits, when the court rendered a decree, making the temporary injunction perpetual. To reverse which, defendants prosecute this writ of error.

Mr. JOHN SCHOLFIELD, for the plaintiffs in error.

Messrs. GOOKINS & ROBERTS, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is urged in this case, that an act of the legislature, authorizing a county to offer bounties and levy a tax for their payment, to induce persons to enlist in the military service, to escape a pending draft, is unconstitutional. In the case of *Taylor* v. *Thompson*, 42 Ill. 9, it was held that such a law, authorizing a township to offer such bounties, and to levy such a tax, was both constitutional and for a corporate purpose. We again hold in the case of *Henderson* v. *Lagow*, id. 360, that the same rule, in principle, applied to a county having similar authority to pay such bounties and to collect such taxes. That such power was within the scope of legislative authority. These cases fully dispose of this question.

The county, it appears, on the 28th of January, 1865, passed a series of resolutions to offer bounties to all persons who should volunteer for the service, and to involuntary enlistments, as well as to persons who should be drafted, and received into the service under the existing call for men, or should be drafted and furnish a substitute; provided they were severally credited to some town whose quota was not full. These resolutions were adopted without any statutory authority, and, consequently, conferred no rights and imposed no obligations.

Afterward, however, on the 7th day of February, 1865, the general assembly passed an act authorizing the board of supervisors in this and some other counties, at any regular or special session, to levy such special tax upon the taxable property of the county, as in their opinion might be necessary to raise a

sufficient fund to pay a bounty to persons enlisting in the military service of the United States, during the continuance of the present rebellion, not to exceed one hundred thousand dollars for each county. Private Laws 1865, vol. 1, p. 110. The other provisions of the act relate to the mode of its execution, and are not material to the questions involved in this record.

On the 15th of March the board of supervisors resolved, that, as doubts existed as to the validity of their proceedings in January, and as the act of the legislature had been adopted conferring power in the premises, they, to remove all doubt, passed another set of resolutions. By them they declared that all persons who had theretofore, or should thereafter, voluntarily enlist or be drafted into the service, and credited to any town in the county until its quota was filled, should be paid a county order for four hundred dollars. And the county clerk was required to issue and deliver an order for that amount to each of such persons. They also provided for a like bounty to every person that should furnish a substitute. They also declare that orders issued under the resolutions of the previous January should be valid. They at the same time levied a tax of six and a half per cent on the assessed value of the taxable property of the county to pay these several bounties.

As regards the county orders issued to pay bounties for enlistments made after the 15th of March, when the latter resolutions were adopted, there can be no question of the power to issue them. The act conferred the power, and the resolutions manifest the intention to act under its provisions, and the issuing of the orders and the levy of the tax to provide a fund to meet and redeem them, was fully warranted, and their action to that extent must be held to bind the county, and to authorize the enforcement of the tax.

It, however, appears that a small number of county orders were issued and delivered to persons who enlisted after the passage of the law and before the adoption of the resolutions to carry out its provisions. And it is insisted that these bounties were not authorized and that the tax levied for their payment should therefore be restrained in its collection. This,

of course, depends upon the authority conferred by the act of the legislature. It declares that the board of supervisors may levy a tax to pay bounties to persons enlisting in the service during the continuance of the present rebellion. The act does not declare that they may do so to pay for enlistments after they shall, as a board, determine to pay such bounties, but that they may pay such for enlistments during the continuance of the rebellion. The rebellion did continue after the passage of the law, and until after these enlistments were made, and they are fully within the authority conferred, and the portion of the tax necessary for the payment of orders issued to them as bounties was authorized and should not be enjoined.

It appears that bounties were paid in county orders to six or eight persons who enlisted after the resolutions adopted in January and before the passage of the law. Were such enlistments embraced in the law? From the language of the law we infer it was designed to operate prospectively and not retrospectively. It in terms provides for enlistments which shall be made during the continuance of the rebellion; not those who had enlisted. And when we look to the object of the enactment, it seems to be clear that such was the legislative will. It was designed to enable the citizens to avoid a future draft then impending. To have paid persons who had already enlisted would not promote the object intended. That could only be done by inducing the requisite number of persons to enlist, and hence the bounty was offered and paid to stimulate the filling up of the quota of the county. If the legislature had intended to embrace past enlistments other and different language would have been employed.

There remains to be considered the question whether the county orders issued as bounties to the persons who were drafted and had furnished substitutes were authorized. While the clerk was, by the resolutions adopted, directed to issue orders to such persons, the act of the legislature confers no power. We held in the case of *Drake* v. *Phillips*, 40 Ill. 388, that a tax levied by a town to refund money paid for substitutes and enlistments, in the absence of legislative authority,

was without legal warrant, and its collection was restrained. The statute has conferred no power on the county to pay bounties to drafted men who had been mustered into the service, or who had furnished substitutes. The policy of the act was to induce enlistments and to save the county from a draft, and that is the consideration for the orders issued to pay the bounty. After a person had been drafted and placed in the service, or his substitute had been accepted, there was no necessity to pay him money, nor would such payment be founded upon any such consideration. It would in no wise tend to relieve the county from the unfilled quota. Such persons are then in the service of the government, and have no pecuniary claim on the county, nor can the county then pay them for their services to the general government any more than they could bestow bounties on persons remaining at home, or pay the debts of individuals. The statute, however, has made the act of enlistment a sufficient consideration to support a contract to pay a bounty to induce the enlistment. These county orders were therefore issued without legal authority and should not be paid.

But must the collection of the entire tax of this town be restrained because some eight or ten orders out of more than one hundred were illegally issued? Under a bill properly framed, a court of chancery would not prevent the holders from collecting, or the treasurer from paying them. Or if the court can, under this bill, ascertain the proportion that the illegal bears to the legal bonds, it could thereby be determined what portion of this tax would be illegal, and, when ascertained, the portion of the tax necessary, and which would go to pay those illegally issued bonds, should be restrained and the remainder collected. The decree of the court below is reversed and the cause remanded, with directions for the court below to ascertain the proportion of this tax which was levied to pay these illegal bonds, and to render a decree enjoining the collection of that proportion of the tax, and dissolving it as to the remainder.

Decree reversed.

Syllabus. Statement of the case.

JOSEPH L. HUME *et al.*

v.

GEORGE B. GOSSETT.

1. STATUTES — *construction of.* Section seven of the township organization act of 1861, making a town collector's bond a lien upon all of his real estate, does not repeal the homestead exemption act, so far as his bond is concerned.

2. SAME — *repeal of by implication — not favored — repugnance must be evident.* A repeal of a law by implication is not favored; to resort to this, the repugnance between the statutes must be so clear and plain, that they cannot be reconciled.

3. JUDGMENT — *on official bond of collector — no lien on the homestead.* A judgment rendered against a town collector upon his official bond, is like any other judgment, and creates no lien which can be enforced against his homestead, except in the mode pointed out by statute.

4. HOMESTEAD — *right — how protected.* The homestead right is protected against all liens and sales, and against all modes of conveyance, whether by deed absolute, or by mortgage, unless released or disposed of, in the mode pointed out in the homestead act.

5. SAME — *legislative intention.* The legislature did not design to place the State, as to its revenue, in any better position than the citizen was placed in regard to the collection of his debt, as against the homestead of the debtor.

6. SAME — *when may be sold in execution.* When the value of the homestead exceeds $1,000, on paying that sum to the owner, it may be sold under an execution; and in such a contingency, a judgment, whether upon the official bond of a collector, or otherwise, may be enforced, but it does not create any lien against the homestead of the debtor.

WRIT OF ERROR to the Circuit Court of Edgar county; the Hon. O. L. DAVIS, Judge, presiding.

This was a bill in chancery, filed by George B. Gossett, in the Circuit Court of Edgar county, against Joseph L. Hume and William Ross, impleaded with the trustees of schools of township sixteen, ranges thirteen and fourteen, in Edgar county, to set aside the sale of certain lands owned by the complainant, made upon two judgments obtained in said Circuit Court, against one James C. Burson, complainant's grantor. The defendants demurred to the bill, alleging a want of equity, which demurrer

the court overruled; and the defendants having elected to stand by their said demurrer, the court ordered the sales set aside, and granted a perpetual injunction against collecting the said judgments out of said lands. Whereupon the defendants prosecuted their writ of error to this court.

There is but a single question presented by the record for the decision of this court, and which is stated in the opinion.

Messrs. JOHN SCHOLFIELD and R. N. BISHOP, for the plaintiffs in error.

Mr. JAMES A. EADS, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The plaintiff in error makes this single question upon this record: "Is a judgment against a town collector, on his official bond, a lien upon his homestead?"

To determine this question, we have only to look to the statute, and to the decisions of this court thereon. The plaintiff in error contends, inasmuch as the township organization act was passed subsequent to the homestead act, and as it contains a provision inconsistent with that act, it necessarily repeals it.

What is that provision? It is this: after providing, that the collector shall execute a bond to the supervisor, section seven provides, that every such bond shall be a lien upon all the real estate, severally, of such collector, within the county, at the time of filing thereof, and shall continue to be such lien until its conditions, together with all costs and charges, which may accrue by the prosecution thereof, shall be fully satisfied. Sess. Laws of 1861, p. 227.

The act of 1851, relating to township organization contained this same provision. Scates' Comp. 330. It was approved on the 17th of February, 1851. On the 11th of February, preceding, the homestead act was passed. On the 17th of February, 1857, this act was amended, by a law declaring, that the object of the act was to require, in all cases, the signature and acknowledgment of the wife as conditions to the alienation of the homestead.

When, in 1861, the legislature revised the act of 1851, section seven of the act of 1851, making the collector's bond a lien, was merely transferred, without alteration, to the act of 1861, above quoted. There is nothing in this legislation manifesting an intention to change the law as it had theretofore existed. Had it been the purpose of the legislature to deprive township collectors and their families of the benefit of the homestead act, such a purpose would have been clearly expressed, or the legislation be made so repugnant, that the last could not stand with the first. The legislature seem to have been very regardful of this homestead right. A repeal of a law by implication is not favored. The repugnance between statutes must be so clear and plain, that they cannot be reconciled, to justify a resort to this doctrine. *Bruce* v. *Schuyler*, 4 Gilm. 221; *Town of Ottawa* v. *County of La Salle*, 12 Ill. 339.

Although the collector's bond be a lien on all the real estate of the maker of it, so is a judgment; but, as this court said in *Green* v. *Marks*, 25 Ill. 221, a judgment was not a lien upon the homestead.

If the bond be a lien, and the judgment rendered upon it also a lien, it is one which, under the decisions of this court, cannot be enforced, as against the homestead, except in the mode pointed out in the statute. *Pardee* v. *Lindley*, 31 Ill. 187.

In our view of this legislation, the homestead right is protected against all liens and sales, and against all modes of conveyance, whether by deed absolute or by mortgage, unless it shall be released or disposed of in the mode prescribed in the act.

There is nothing in this legislation, upon the two subjects of revenue and homestead exemption, to authorize the inference, that the legislature designed to place the State, as to its revenue, in any better position than the citizen was placed in regard to the collection of his debt.

This homestead right may in some cases be taken from the owners, as, where the land on which it arises is of a value exceeding $1,000. On paying that amount to the claimant, it may be sold under an execution; so that, while it cannot be

asserted as universally true, that a judgment on a collector's bond is a lien upon the homestead, it may be asserted it is so, *sub modo*. The case of *Green* v. *Marks*, *supra*, is full to the point, that a judgment is not a lien upon it, and we see no difference in principle between that case and this. We are satisfied it was not the intention of the legislature to place the collectors of the public revenue and their families in any worse position, or one less favored, than was that of the citizens generally. The policy of the law, as we have often said, was to secure a home for the unfortunate debtor and his family, and to be secure from the reach of creditors, except in the mode prescribed by the law.

The decree of the Circuit Court, overruling the demurrer to the bill, must be affirmed.

Decree affirmed.

THOMAS F. TOMLIN
v.
DAVID W. HILYARD.

1. TENANTS IN COMMON — *parol partition between — effect of.* A parol partition of lands between tenants in common, when followed by a several possession, gives to each the rights and incidents of an exclusive possession of his property.

2. SAME — *of the legal title — conveyance may be compelled.* In such case, while the legal title might not be considered as having passed, unless after a possession sufficiently long to justify the presumption of a deed, yet each co tenant would stand seized of the legal title of one-half of his allotment and the equitable title to the other half, and could compel from his co-tenant a conveyance according to the terms of the partition.

3. HOMESTEAD RIGHT — *to what character of estate it may attach.* The homestead law protects equally an equitable as well as a legal title to lands, and when a parol partition between tenants in common was had, followed by a several possession, and before judgment lien attached, each can claim the homestead right, even though the legal title to one-half of his allotment be in the other, as each held it since partition as trustee for the other.

4. POSSESSION — *severance of — between tenants in common — proof of.* A mere severance of possession between tenants in common, may be inferred from far less proof than would be required to show a sale of land to a stranger.

5. WITNESS — *cannot testify as to matter of law.* An interrogatory asking a witness to swear as to a matter, which in part was a question of law, is improper.

WRIT OF ERROR to the Circuit Court of Mason county; the Hon. JAMES HARRIOTT, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. LACEY & HARNDON, for the plaintiff in error.

Messrs. DUMMER & PRETTYMAN, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of ejectment brought by Thomas F. Tomlin against David W. Hilyard, to recover forty acres of land. It appears by the record, that on the 10th of March, 1856, eighty acres, of which the tract in controversy is a part, were bought by said Hilyard, and one Thompson Tomlin, as tenants in common, the deed being made to them jointly. On the 1st of January, 1858, one Walker obtained a judgment in the Circuit Court of Mason county, where the land is situated, against Hilyard and Thompson Tomlin, on which an execution was duly issued, and the land in controversy sold on the 16th of March, 1858. The plaintiff below derived title under this sale and the sheriff's deed made thereon.

The defense was, that before said judgment was obtained, the eighty-acre tract was divided between Hilyard and Thompson Tomlin, the former taking the south forty acres, being the tract in controversy, and the latter the north forty, and that, although the partition was by parol, Hilyard, in the spring of 1857, took open and exclusive possession of his forty, and has occupied it with his family, as a homestead, from that time to the present. On the trial, a jury was waived, and the court on the evidence gave judgment for the defendant.

A parol partition between tenants in common, when followed by a possession in conformity therewith, will so far bind the possession, as to give to each co-tenant the rights and incidents of an exclusive possession of his property. 1 Wash. on Real

Prop. (2d ed.) 450; *Jackson* v. *Hardee*, 4 Johns. 202; *Jackson* v. *Vosburgh*, 9 id. 276; *Slice* v. *Derrick*, 2 Rich. 627; *Coles* v. *Wooding*, 2 Patton & Heath (Va.) 189; *Wildley* v. *Barney's Lessee*, 31 Miss. 644; *Manly* v. *Pettee*, 38 Ill. 136. While the legal title might not, perhaps, be considered as passing by such parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition followed by a several possession, would leave each co-tenant seized of the legal title of one-half of his allotment, and the equitable title to the other half, and by a bill in chancery he could compel from his co-tenant a conveyance of the legal title, according to the terms of the partition. The homestead law protects a possession held under an equitable as well as a legal title. *Blue* v. *Blue*, 38 Ill. 9. If then, in the case before us, there has been a parol partition before the judgment lien attached, and a several possession in conformity thereto, the homestead right can be claimed by Hilyard, even if the legal title to one-half of his allotment is still in his co-tenant. He has held it since the partition merely as trustee for Hilyard.

It is insisted, however, that the parol partition in the case before us is not clearly proven. The evidence is contradictory, but while Thompson Tomlin himself denies that a partition was agreed upon, the other clearly proven facts are such strong evidence of partition that we are not inclined to set aside the finding of the court. The witness Jonathan Thompson, swears that he occupied the eighty acres as tenant of Tomlin and Hilyard, in 1856; that he afterward rented of Thompson Tomlin the forty acres not in controversy in this case; that Hilyard has occupied, exclusively, the forty acres in controversy, from the spring of 1857 to the present time; that this was matter of notoriety, that Tomlin claimed and occupied the other forty by his son or tenants; and that the witness, in the spring of 1857, ran a furrow with a plow between the two forties to mark the division line. It further appears that Hilyard built a house on his forty before he moved on it, and that he planted an orchard in 1857 or 1858. Another witness swears it was notorious that Hilyard and Tomlin were claim-

ing the eighty acres separately, and that such exclusive and separate claim and occupation have continued to the present time. All this is very strong evidence that a partition was made.

It need hardly be remarked, that a mere severance of possession between tenants in common may be inferred from far less proof than would be required to show a sale of land to a stranger.

It is also objected that the court erred in not permitting the plaintiff to ask a witness "if the judgment was not obtained for the purchase money of the land in controversy." The interrogatory was objectionable, not only because leading in form, but because it was asking a witness to swear as to what was, in part, a question of law. The witness should have been required to state the manner in which the indebtedness accrued. The land was not bought of Walker, the plaintiff in the judgment, but from one Blunt, and whether the debt to Walker accrued in such a way that it could be regarded as purchase money for land bought of Blunt, as in the case of *Austin* v. *Underwood*, 37 Ill. 441, must necessarily involve a legal question which a witness is not competent to solve. So far as the facts appear from the further examination of the same witness the judgment was not for the purchase money. The record discloses a homestead right in the appellee, and the judgment must be affirmed.

Judgment affirmed.

ST. LOUIS, JACKSONVILLE & CHICAGO R. R. CO.

v.

TRUSTEES OF ILLINOIS INSTITUTION FOR THE EDUCATION OF THE BLIND.

1. STATUTE—*construed*—*grant.* Although the language of a statute may be sufficiently comprehensive to embrace any property owned by the State, still it will not be construed to include property used by the State for a specific purpose. In such a case it cannot be inferred, that such was the intention of

Statement of the case.

the legislature, and all statutes must be construed according to the intention of the body enacting them.

2. Where the general assembly in granting a railroad charter, authorized the company to enter upon, take possession of, and use all and singular any lands, streams and materials of every kind for the location of the road, depots, etc., for the construction of the road; and it contained a provision, that "all such lands, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes;"—*Held*, that the grant does not include the ground connected with, and used by the State for the education of the blind, although adjoining the road, and convenient for its use.

3. Where the general assembly has made such a grant, and subsequently, by another act, grants the company a portion of the right of way to an old and abandoned railroad belonging to the State, which is upon the line of the road of the company, it will be inferred, that such subsequent grant is a legislative construction of the prior grant, from which it appears, the general assembly did not understand, that the former grant embraced property belonging to the State, not used by the State, although convenient to the construction of the road, much less to embrace property appropriated to other purposes, and in the actual use of the State.

APPEAL from the Circuit Court of Sangamon county; the Hon. EDWARD Y. RICE, Judge, presiding.

This was a proceeding commenced by the St. Louis, Jacksonville and Chicago Railroad company before a justice of the peace of Morgan county, for the purpose of condemning a portion of the grounds owned and used by the State, for the maintenance of the institution for the education of the blind, situated in the city of Jacksonville, for depot purposes.

Three commissioners were appointed to examine and condemn the property. They reported that they had condemned for the use of the road a strip on the west side of the grounds of the institution. From this assessment the trustees of the institution appealed to the Circuit Court of Morgan county. Afterward the case was removed by change of venue to the Circuit Court of Sangamon county.

A trial was subsequently had in that court on an agreed state of facts, when the court quashed the proceeding and reversed the condemnation made by the three commissioners. And the case is brought to this court on appeal for the purpose of reversing the judgment of the Circuit Court.

Messrs. Morrison & Epler, for the appellants.

Mr. Henry E. Dummer, for the appellees.

Mr. Chief Justice Walker delivered the opinion of the Court:

It appears that the Jacksonville, Alton and St. Louis, and the Tonica and Petersburg railroads, were consolidated under the general law of this State regulating such organizations, and thereby became the St. Louis, Jacksonville and Chicago Railroad company. By an act of the general assembly approved February 13, 1863, this consolidation and the first election of its officers were declared legal and valid. This act also declares that the company thus formed shall enjoy, possess and exercise all of the privileges, immunities and franchises, which were possessed by either and both of the companies entering into and forming the consolidation, and vests in the new company all of the property, rights, credits and choses in action previously held and owned by the two companies entering into the new organization.

At the session of 1853, of the general assembly, a charter was granted to construct a railroad from Jacksonville to Alton under the name of the Jacksonville and Carrolton railroad. At the session of 1857, by an amendatory act, the name of the company was changed to that of the "Jacksonville, Alton and St. Louis Railroad company." By the third section of this amendatory act, the company were authorized to receive voluntary grants of lands or other property for the use of the road. "Also to enter upon, take possession of and use, all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine-houses, shops and other buildings necessary for the construction, completing," etc., of the road. And this section further provides that, "All such lands, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes."

It is under this enactment that appellants claim the right to appropriate a portion of the grounds used and occupied by the State for the institution for the education of the blind. These premises are owned by the State, on which buildings and other improvements have been made at large expense from the State treasury, and it is maintained at a large expense by annual appropriations. It is regarded as an institution deserving the care of the State, and requiring its support. Nor has the State, so far as we are aware, ever manifested the slightest disposition to abandon it, as to transfer it to other hands. It is one of the institutions to which our citizens look with pride, and no limited degree of satisfaction. It is supposed to confer upon the community great benefits, that could not be attained by any other practical means. It confers all of the benefits of a good education upon a class of unfortunates, the most of whom would otherwise remain wholly uneducated. We are compelled therefore to conclude, that the State has no intention of abandoning its fostering care and support of this institution.

The language of this enactment is broad and comprehensive, and would literally embrace the right to appropriate any property owned by the State. But failing to grant any property specifically, can it be inferred, that it was intended that property owned and already appropriated by the State to permanent and specific purposes, could be taken? This property was not specifically granted by the State to the company, but had been permanently appropriated to the use of a State institution, and was being used for that purpose. Had the property been vacant and unoccupied by the State, then it might have come within the provisions of the act. But having been permanently appropriated and employed by the State for other purposes, can it be inferred that it was the intention of the general assembly to grant this property? The construction of this act depends, like all others, upon the intention of the legislature enacting it.

The language of the act is broad enough to embrace any property of the State necessary to the construction of depots, turn-outs, engine-houses or other buildings necessary for the

completion and operation of the road; yet we apprehend, that it would hardly be contended that this grant would embrace all of the grounds and buildings connected with this institution. And yet we are unable to draw the line where the power would cease, to appropriate this property. If the company may appropriate this portion of the property why not all, because the only limit of the power would, by the construction contended for by appellant, be the necessities of the company. But if we were compelled to adopt the construction contended for, we should hold, that nothing short of an imperative, overpowering necessity, such as the failure to be able, without the use of this property, to employ and run their engines, and transport freight and passengers, must exist before property already appropriated and used by the State, could be applied to the use of the road. And no such overpowering necessity can exist, as the station and station grounds can be located at a different place, where all of the ground necessary and convenient to the road may be obtained.

The word "necessary" has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. If we were compelled to say that the general assembly intended to embrace this property in the grant, we should hold, that, as a condition to its appropriation to the use of the company, it would have to appear, that this property was indispensably necessary, not merely convenient or profitable to the road, but to its completion and operation. That, without it, the objects and purposes of the creation of the company would be defeated, and the company cease to exist. There can be but little doubt, that this strip of ground would be of great convenience to the company, and we entertain as little doubt, that all of the grounds and buildings thereon would also be of greater convenience, to say nothing of the saving of expenditures in the purchase of lands for the use of the company. But we cannot believe that it is any thing more than a matter of convenience and profit that the company should apply this ground to the purposes sought.

But as to the legislative intent in adopting this law: To rebut the presumption that this ground was intended to be granted, is the fact, that the State was using it for purposes repugnant to the object of the grant. It is not to be presumed that the State would, by this loose and general language, destroy an institution that has been founded by the State, and fostered and supported with such care and solicitude for nearly twenty years. And if the grant is good as to the portion of the property claimed by the road, it must be equally so as to the entire property. And, had it been the intention of the legislature to donate this property, it may well be asked why appropriations are still being made to support it as an institution for the education of the blind, when it is liable at any time to be converted to railroad uses, and the occupants expelled. From these appropriations, and the fact that no other provision has been made for the removal of the institution to a different place, or for their education, we must conclude that such was not their intention.

Again, the legislature gave a construction to this act, by a law adopted at the session of 1859. By this act, the general assembly surrendered to certain named individuals, for the use of appellants, the right of the State to the track, grade, right of way, or other privileges and appurtenances, as belonged to the Springfield and Alton railroad, as lies between the road of appellants, in a township therein named, and extending through the town of Upper Alton and to the eastern limits of that city. This enactment clearly shows, that the legislature supposed that appellant did not have the right to even appropriate a portion of the right of way owned by the State, of an old and abandoned road which the State had previously undertaken to build. Then, if the legislature understood that appellants could not, under the grant already made, appropriate property which the State had abandoned for the purposes for which it had been acquired, how can we suppose they intended by the same grant to embrace property of such value, and which the State had in actual use and occupancy. We are, for these reasons, of the opinion, that appellants had no power, under this enactment, to appro

priate any portion of the grounds or property belonging to the State and used for the purposes of this institution; and the judgment of the court below must be affirmed.

Judgment affirmed.

JACOB R. HARRIS
v.
JOHN S. GALBRAITH *et al.*

1. EQUITY — *will not relieve for failure to make defense at law.* Where a party has a legal defense to an action at law, he must avail himself of it in such suit.

2. EVIDENCE — *parol evidence — inadmissible to vary terms of a written contract.* In a suit on a promissory note, parol evidence is inadmissible, to show a cotemporaneous verbal agreement, varying the terms of the note.

3. SAME — *admissible to impeach consideration.* But parol proof may be received to impeach the consideration of a note.

4. ATTORNEY — *when authority of, to prosecute suit, will be presumed.* If, in a suit upon a promissory note, an attorney of this court appears, and has possession of the note sued upon, the inference is, that he has authority to conduct such suit.

5. SAME — *want of authority no ground for equitable relief — how and where questioned.* That an attorney had no authority to prosecute the suit at law, affords no ground of equitable relief; such question must be determined in the court of law, and not of equity.

6. CHANCERY — *bill of discovery — what must be done before party entitled to.* The question, whether a party is entitled to a discovery, against one who is prosecuting him in an action at law, cannot be determined until he has filed his plea to such action divulging the character of his defense.

7. SAME — *admissions by defendant of no avail.* And, in such case, there being no issue in the action at law, should the defendant admit the allegations of the bill, the complainant could not avail himself of such admissions.

8. SAME — *when no equity appears on face of bill — may be dismissed.* It is proper for a court, on its own motion, to dismiss a bill, which, on its face, shows no ground for equitable relief.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

The opinion states the case.

Messrs. J. GRIMSHAW & J. H. WILLIAMS, for the appellant.

Messrs. BUCKLEY, MARCY & HUNT, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery in the Adams Circuit Court, exhibited by Jacob R. Harris against John S. Galbraith, and John N. Hagood, to enjoin the proceedings at law in a suit commenced by Galbraith, for the use of Hagood, against Harris, in the same court, and for a discovery as to Galbraith.

The defendants were brought in by publication, and a decree *pro confesso* taken as to Galbraith, and a rule upon Hagood to answer. Hagood put in his answer under oath, denying all the equities claimed in the bill, which were alleged to consist in a supposed defense to the note sued on at law, and in the alleged fact, that the action at law was prosecuted without the knowledge or authority of Galbraith, and in the necessity of a discovery from Galbraith, the payee, to enable Harris to defend the action at law.

As we understand it, the note was given by Harris to Galbraith for some negroes purchashed by one Gray, in La Grange, Missouri, where all the parties resided, of Galbraith. That the negroes, in Gray's absence, were delivered to Harris, who executed the note sued on, for the price, with the understanding, that on Gray's return to La Grange, his note of the same tenor and date, should be given to Galbraith in the place of Harris' note, the latter being intended only as a security on a guaranty, that Gray should give his note.

This defense, if available to complainant, was a strictly legal defense, and should have been set up in the action at law. It required no discovery from Galbraith in order to plead it, though it might to prove it. But we are not of the opinion, that the defense was available anywhere, for the reason, that it would be varying a written contract by proof of a verbal agreement made at the same time. This would be in violation of a well known rule of evidence. The contract expressed in

the note is, that the money will be paid at its maturity. This cannot be varied by proof of an agreement, that the note could be discharged by delivering the note of another person.

In *Barge* v. *Dishman*, 5 Blackf. 272, which was a case on a promissory note, and a verbal agreement set up, varying the terms of the note, it was held that the proof was inadmissible.

The rule is concisely stated in *Penny* v. *Graves*, 12 Ill. 287, that parol evidence may be received to impeach the consideration of a note, but not to vary its terms. This case is not unlike the one before us, as the effect of the parol evidence in both is to show that the note sued on for the use of Hagood, although absolute in terms, was in fact conditional, to be delivered up on receipt of Gray's note of the same tenor and amount.

The same rule is recognized in the case of *Harlow* v. *Boswell*, 15 Ill. 56, and in *Fox* v. *Blackstone*, 31 id. 538. Other cases might be cited to the same effect, but it is not necessary. There was nothing in this case going to impeach the consideration of this note, for the negroes were delivered to Harris. Galbraith parted with his property in them on the faith of this note, and it is immaterial to whom the benefit accrued, whether to Harris or to Gray. That matter must be adjusted between them.

Upon the point of authority of the attorney to sue upon the note, that cannot be questioned in a court of equity. This court has recently held, in an unreported case, that it was sufficient, if an attorney of this court appeared in a case and had possession of the note sued on. The inference would be, that he was properly in the case and had authority to conduct the suit. If not, the investigation should be had in the court of law. It is no ground for relief in equity, nor was it so put by complainant's counsel. It was *res inter alios* merely, and not a feature in the case.

It is difficult to say that the complainant had a right to a discovery from Galbraith, as the character of the defense is not divulged. There was no plea to the action at law, and until one is filed, it cannot be certainly known what the defense is, consequently it cannot be determined whether the party is entitled to a discovery or not.

As a bill of discovery against Galbraith, had he made one admitting the allegations of the bill, it would not have helped the complainant, for the reasons we have given. The court could do no otherwise than dismiss the bill, which it did do on its own motion.

The bill, on its face, shows no ground for equitable relief, and it was therefore proper on the hearing to dissolve the injunction and dismiss the bill. The decree must be affirmed.

Decree affirmed.

JOHN LAMB, impleaded, etc.,
v.
MINERVA RICHARDS, Administratrix, etc.

1. REDEMPTION FROM MORTGAGE SALE — *rights of judgment creditor.* Where A mortgaged certain lands to B, and subsequently conveyed the same to C, who in turn mortgaged them to D, and then A died, and B foreclosed his mortgage, making the heirs and administrator of A and the grantees, mortgagors and mortgagees, subsequent to his mortgage, parties to the suit, and the premises were sold to B on the foreclosure decree, who held the certificate of purchase until after the lapse of twelve months from the time of sale, without any person attempting to redeem within that time, — *held,* that B, after the lapse of twelve months from the time of sale, held the mortgaged property discharged of all right in any person, entitled by statute to redeem within such period; and that, in such case, where E, a judgment creditor, in good faith redeemed from B, before the lapse of fifteen months from the day of sale, E, by such redemption, was subrogated to all the rights of B, and took the property discharged of any right in any person allowed by statute to redeem within one year after sale made.

2. FORMER DECISIONS. *Williams* v. *Tatnall,* 29 Ill. 565, considered and explained; also, the cases of *Sweezy* v. *Chandler* and *McLagan* v. *Brown et al.,* 11 id. 445, 519.

APPEAL from the Circuit Court of Morgan county; the Hon. D. M. WOODSON, Judge, presiding.

This was a suit in chancery instituted in the Morgan county Circuit Court, by the appellee, as administratrix of the estate of

her husband, George M. Richards, to foreclose a certain mortgage, executed by one William Lamb and wife, to the said George M. Richards.

The facts in the case are fully stated in the opinion.

Mr. H. B. McCLURE and Mr. I. J. KETCHUM, for the appellant.

Mr. M. McCONNEL, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 6th of May, 1860, one George M. Richards, being then the owner of certain real estate in Morgan county, mortgaged it to Murray McConnel, to secure certain indebtedness due the latter. In October, 1860, Richards conveyed the premises to William Lamb, and Lamb executed to Richards certain notes for the unpaid purchase-money, and a mortgage upon the premises. Subsequently, McConnel filed a bill to foreclose his mortgage, making parties Minerva Richards, the administratrix of the mortgagor, who had in the mean time died, as also his heirs-at-law, and William Lamb, the purchaser. A decree of foreclosure and sale was rendered at the September Term, 1862, of the Morgan Circuit Court, on the 27th of December, 1862, the lands were sold to McConnel for $2,758.71. Neither the administratrix nor the grantee redeemed within the year, but after that time, and before the expiration of fifteen months, one Joseph R. Askew, a judgment creditor of William Lamb, redeemed from the sale, and the premises were then sold on his execution, and deeded to him by the sheriff. McConnel accepted the redemption money, and Lamb attorned to Askew. Subsequently Askew sold and conveyed to John Lamb, who went into possession. Minerva Richards now files this bill, as administratrix, against John Lamb, asking that the premises be sold to pay the mortgage executed by William Lamb. The court so decreed, first, applying as a credit on that mortgage, the amount paid by Askew, in redeeming from the sale to McConnel. John Lamb brings the record to this court.

It is to be first observed, that the pleadings do not aver, nor do the proofs show, that there was any collusion between Askew and William and John Lamb, for the purpose of evading the payment of William Lamb's notes to Richards, or that John took the title from Askew for the benefit of William. So far as this record shows, these proceedings have all been in good faith, though it must be admitted there are circumstances connected with the case which cast some suspicion upon it, and in reversing, we shall remand with leave to the complainant to amend her bill, for the purpose of bringing this question before the court, if she desires.

The first question on the record as it stands, relates to the right of Askew to redeem as a judgment creditor of William Lamb. The mortgage had been made by Richards. Before McConnel foreclosed, Richards had conveyed to William Lamb. The 24th section of the statute of judgments and executions gives to the "mortgagor, his heirs, executors, administrators or grantees" the right of redemption within the twelve months, and upon their failing to redeem, the same section gives the right to judgment creditors. This right of redemption has always been fostered in the courts by a liberal construction of this statute, since it tends to save from sacrifice the property of failing debtors, and enables a larger number of creditors to secure payment of their debts. Upon this principle this court has several times held, as in *Sweezy* v. *Chandler*, 11 Ill. 445, that it was unnecessary the judgment under which redemption is made should be a lien on the land redeemed, thereby applying a more liberal rule than that laid down by the courts of New York, under the more stringent language of their statute, from which ours is substantially borrowed. But even if the right of redemption were confined to those creditors whose judgments were liens, this right existed in Askew. Richards, before the foreclosure, had sold and conveyed to William Lamb, and against him Askew had a judgment. But for the sale under the mortgage, he could have subjected this land to the payment of his debt; and it certainly comports with the spirit as well as the letter of the law, to permit him to remove the obstacle in his

path by redeeming from the sale under the mortgage. We by no means say that a judgment creditor of the mortgagor could not also redeem. It may be a reasonable construction to hold that, as either the mortgagor or his grantee can, by the express language of the statute, redeem within the twelve months, so, when their rights are gone, a judgment creditor of either may redeem. But if it is found necessary to confine the right to one of them, it obviously belongs rather to the judgment creditor of the grantee, by virtue of his lien, than to the judgment creditor of the mortgagor.

What, then, was the position of Askew after redeeming from the sale to McConnel? By the numerous and uniform decisions of this court, beginning with *Sweezey* v. *Chandler* and *McLagan* v. *Brown*, 11 Ill. 445 and 519, and coming down to several cases recently decided and not yet reported, among which is *Blair* v. *Chamblin* of the January Term, 1866 (39 Ill. 521), the redeeming judgment creditor is subrogated to the rights of the purchaser from whom he redeems. The case of *Williams* v. *Tatnell*, 29 Ill. 565, does not really militate with this doctrine. In that case there was first an unrecorded mortgage, then a judgment in favor of Hays, who had, however, at the date of his judgment, actual notice of the unrecorded mortgage, and then a judgment in favor of Williams. But before the latter obtained his judgment, the mortgage was recorded. There was, therefore, notice to both judgment creditors of the elder lien of the mortgage. Hays sold under his judgment and became himself the purchaser, and Williams redeemed as a judgment creditor. The only question in the case was, whether the mortgage was subordinate to the title acquired under the redemption, and the court held, it clearly was not, because both judgments were junior in date and the claimants affected by notice. It was, however, urged in argument, that Williams, the redeeming creditor, was to be considered not merely as subrogated, by the redemption, to the same rights which Hays had, but that he must be accorded a better position, by being treated as having been a bidder without notice at the sale under Hays' judgment, and in support of that

position counsel cited the twenty-second section of the statute of judgments and executions. It was in answer to that position, that the court traced the history of our legislation on this subject, and came to the conclusion that the introduction of that section into the Revised Statutes of 1845, was an inadvertence of the compiler. But the court did not deny that, independently of that section, and on the most familiar principles of equity law, Williams, by his redemption from Hays, was subrogated to the position and rights of the latter, though he could not claim any better or higher. On the contrary, the court constantly recognizes in the opinion the doctrine of subrogation. It says at the outset "the first and important inquiry is, was Hays chargeable with notice of this mortgage?"

Now, as Williams had paid Hays' debt by redeeming, and as his own judgment was confessedly junior to the mortgage, this inquiry, instead of being "the first and important" one, would have been wholly unimportant unless the court considered that Williams took by subrogation the position of Hays. Again the court say: "Had Hays not been chargeable with notice, so that his judgment had become a prior lien to the mortgage, which attached to the entire estate, then, indeed, a different question would be presented. But we do not now propose to determine what estate the redeeming judgment creditor, whose judgment is junior to the mortgage, acquires by a sale under such junior judgment upon a redemption from a sale under a judgment senior to the mortgage." That question was not presented by the record. The court, in conclusion, in referring to the cases of *Sweezy* v. *Chandler* and *McLagan* v. *Brown*, 11 Ill. 445 and 519, says, that in those cases this twenty-second section was alluded to merely as a make-weight, and that the cases were decided on other grounds. The court, so far from overruling those cases, affirms their decision, and only questions the reference in the opinions to this section of the statute.

The other grounds upon which those decisions are left to rest are, of course, the conceded principle, that when a junior is compelled, in order to protect himself, to pay a senior incumbrance, he is substituted to the rights and position of such

senior incumbrancer. This is natural equity and has often been enforced by the courts. See *Flack* v. *Kelly*, 30 Ill. 471, and cases there cited. We have said this much in reference to the case of *Williams* v. *Tatnall*, because we do not wish that case to be considered as conflicting with the prior and subsequent decisions of the court.

In this case, assuming, as we must do, on this record, that Askew and John Lamb acted in good faith, the latter now stands in the shoes of McConnel, and has the same title to these premises, as against complainant, that McConnel would have had if no redemption had been made. The great hardship and injustice of any other rule are very apparent. He has paid a large sum of money in redeeming from the elder lien. The court below found $5,216.18 to be due complainant on the mortgage, and gave a decree for that amount. If this should equal the value of the land, the money paid by Askew, in redeeming, and by John Lamb to Askew, will be wholly lost to them. In the rule we apply, there is no hardship or wrong. The administratrix might have redeemed within the year, and thus, while paying the debt of the intestate, have saved the lien of the second mortgage. We do not overlook the fact, that McConnel, when he foreclosed his mortgage, also held the junior mortgage made by William Lamb, and the notes secured by it; but he held them merely as collateral security for the payment of the debt due him, and, after he received the redemption money, redelivered them to the administratrix. The notes and mortgage were then, as now, the property of the estate of Richards. He was the mortgagor of McConnel and the mortgagee of William Lamb, and his administratrix and heirs, being made parties to McConnel's bill, lost all claim to the land under either mortgage by their failure to redeem. If McConnel had, in fact, owned both mortgages and had wished to preserve an ultimate right of redemption under the junior mortgage, and thereby prevent its being cut off by a creditor redeeming under the first, we do not see why that might not have been provided for in the decree. But, instead of that, his object then was to cut off the rights of the representatives of

Richards, under the one mortgage as mortgagors, and under the other as mortgagees. This he did, and at the end of twelve months from the sale, held the premises discharged of their claims, and when Askew redeemed, he succeeded to McConnel's rights. If Askew had not redeemed, McConnel would have held the premises as against the junior mortgage. The lien of that mortgage was cut off by the foreclosure of McConnel, as to all parties to his bill, and it matters not to the representatives of Richards whether McConnel or Askew obtained the title. When McConnel accepted the redemption money, he virtually assigned his title to Askew.

On the case now made, the bill would have to be dismissed; but the complainant will have leave to amend her bill, on payment of costs, if she should desire so to do.

Decree reversed.

FREDERICK E. RADCLIFF *et al.*

v.

EBENEZER NOYES.

1. SERVICE—*process—publication—appearance.* The object of service of process, or publication, is to bring parties before the court. Where all of the defendants in a suit appear and consent to a change of venue, it is immaterial whether they have been served or publication has been made, as they are in court by appearance. Where the record recites that the parties came by their solicitors it will be presumed that all, and not a part only, of the parties entered their appearance, as well those not, as those who had been served.

2. CHANGE OF VENUE—*jurisdiction.* In such a case the court, to which the venue is changed by consent of the parties, acquires jurisdiction to try the cause.

3. BILL—*proper parties.* Where it appears that a person executed a deed of conveyance of a lot of ground to two railway companies, but the deed was delivered to a third person who still held it, and there is nothing besides to indicate that these corporations had purchased the property, paid any consideration, or procured the execution of the deed, inasmuch as the deed was never delivered it will not be presumed that these bodies have any interest in the premises, and they are not necessary parties.

Statement of the case.

4. Where it appears that mechanics and others have liens on the premises for labor, and materials furnished for the erection of a building thereon, and that they had obtained decrees for the same; in a proceeding to cancel a bond for title, held by the person who employed the labor and procured the materials, — *Held*, that the mechanics and material men were indispensable parties to the bill.

5. Nor is the necessity obviated by an offer on the part of complainant to convey the ground on which the house so erected stands, to the mechanics and material men, as they had a right to be heard as to the extent of their lien. In such a case, on canceling the bond, it is error to render a decree that all persons in possession shall surrender it to complainant, as persons might have been in under the decrees enforcing the mechanics' lien.

WRIT OF ERROR to the Circuit Court of Montgomery county; the Hon. CHARLES EMERSON, Judge, presiding.

This was a bill in chancery, filed by Ebenezer Noyes, in the Coles Circuit Court, against Frederick E. Radcliff, David V. N. Radcliff, William Wyman, the Illinois Central Railroad company, and the Terre Haute and Alton Railroad company.

The object of the bill was to set aside a deed executed by complainant to the two railroad companies, and delivered to Frederick E. Radcliff, for a part of a block of ground, situated in the town of Mattoon, Illinois; also, a deed of conveyance for the same premises, made by complainant to David V. N. Radcliff, and delivered to Frederick E. Radcliff, on the grounds that these deeds were obtained from complainant by false and fraudulent representations made by Frederick E. Radcliff, and that no consideration was paid for either conveyance. The bill also alleges, that complainant had previously given to Frederick E. Radcliff, a bond for a conveyance, upon his erecting certain improvements on the block of ground, and the payment of $300. That to procure these deeds he falsely represented, that the railroad companies and David V. N. Radcliff would advance him money to erect the building if these deeds were executed; that David V. N. Radcliff had, for the purpose of defrauding complainant, conveyed the premises to William Wyman for the nominal consideration of five dollars; that he purchased with notice. The bill alleges, that a brick building had been erected and partly finished on the block, and

that divers persons had furnished labor and material therefor, and had obtained a decree for the sale of the premises to satisfy their liens. And complainant offers to convey the portion of the ground upon which the building had been erected, and which had been purchased under the decree. The bill prays, that Frederick be decreed to surrender the agreement, and that the deeds be canceled.

The venue was afterward changed to Shelby county, because the judge had been of counsel in the case; and by agreement of the parties the venue was again changed to Montgomery county.

The bill was taken as confessed against all of the defendants but Wyman. A hearing was had on the bill, amended bill, the answer and amended answer of Wyman, *pro confesso* orders and proofs. The bill was dismissed as to the railroad companies. The relief sought by the bill was granted against the other defendants, and a decree rendered in accordance with the prayer of the bill. To reverse which, defendants prosecute this writ of error.

Messrs. PALMER & HAY, for the plaintiffs in error.

Mr. JOHN SCHOLFIELD, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

When the solicitors for plaintiffs in error entered their appearance, and agreed to the change of venue in the case, the service of process or the requisite publication of notice of the pendency of the suit became unnecessary. The purpose of service or publication is to bring parties before the court. But when they voluntarily enter their appearance, service or publication is thereby rendered entirely unnecessary. The language of the stipulation is broad enough to embrace, and does embrace, all of the defendants to the suit. It says the parties came by their solicitors. It does not state that only a portion of the parties came, but fails in any mode to limit the number. If

not previously in court, plaintiffs in error then entered their appearance, and this renders any consideration of the sufficiency of the publication unnecessary.

This also disposes of the objection that the Circuit Court of Montgomery county failed to acquire jurisdiction by the order changing the venue of the case. If the parties were all in court, and we have seen they were, it must be held that the order of the Shelby Circuit Court changing the venue, based upon the consent of the parties, was binding, and fully conferred jurisdiction on the Circuit Court of Montgomery county.

It is insisted that this bill is defective for the want of proper parties. It appears from the allegations in the bill, that complainant had been induced by the false and fraudulent representations of Radcliff to convey the premises, in the winter of 1857, to the Illinois Central and the Terre Haute, Alton and St. Louis Railroad companies. That Radcliff afterward induced complainant by fraud, in April, 1857, to again convey them to David V. N. Radcliff, which deed he delivered to Frederick E. Radcliff. That in October, 1858, David V. N. Radcliff conveyed the premises to Wyman for the nominal consideration of five dollars, with the intent of defrauding complainant. The bill was dismissed as to the railroad companies. It is urged that from these allegations it is apparent that these corporations were necessary parties.

If it had appeared that the deed had been delivered to these roads or to their agent, then there would be force in the objection. But the bill alleges, that it was delivered to Frederick E. Radcliff, and that he refused to return it to complainant, but held it as a cloud on his title. The default against these companies operated as an admission of the truth of these allegations, and they certainly fail to show that these bodies had any interest in the premises. And no part of the record denies these allegations or sets up or discloses facts showing any interest in these corporate bodies.

It is again insisted, that the bill discloses the fact that other parties had liens on the property. It appears that their liens were created for work and labor performed and materials fur-

nished in erecting the building on the premises, and that they arose out of contracts made with Frederick E. Radcliff. And if so, this was under claim of an interest in the premises, derived through and held under Radcliff, and which operated upon and attached to the title flowing from the defendant in error. These liens, then, bound his title to the premises, and having an interest in the subject matter of the suit, they were necessary parties. Had the liens been created under, and had they attached to an independent adverse title, it would have, no doubt, been otherwise.

It is not an answer to say, that defendant offered in his bill to convey so much of the ground as the house upon which the labor was performed and to which the materials were furnished, occupied. They had a right to be heard as to the extent of their liens and in the determination of that question. But even if the court could have determined the extent of the liens, in the absence of these persons as parties, still the decree is erroneous in decreeing the possession of the entire premises to defendant in error, and that any person occupying the same or any portion of it should surrender to defendant in error. He had disclosed the fact that other persons had such liens, and that they had obtained decrees for their enforcement. And for ought that appears, these persons may have purchased under these decrees and been in possession, by virtue of the sale to satisfy the liens. The court below did not ascertain what portion of the property defendant in error should convey to persons holding these liens, as he, in his bill, had offered; but decrees the possession of the entire block to him. For the want of proper parties the decree of the court below must be reversed and the cause remanded, with leave to amend.

Decree reversed.

Syllabus.

THOMAS SNELL
v.
JAMES DE LAND *et al.*

1. PARTIES — *suing as joint contractors — must show joint interest.* Where plaintiffs sue as joint contractors, they must show a joint interest in the subject matter of the suit.

2. SAME — *common law not changed.* And section 7, chapter 40, of the act entitled, "Evidence and depositions," does not change the common law in this respect; it simply dispenses with certain proofs, which, at common law, persons suing as joint obligees partners or payees were required to make, under the general issue.

3. SAME — *objection — how taken, as to non-joinder, or misjoinder, of parties plaintiff.* In actions on contracts, if there are too few or too many parties plaintiff, it is fatal to a recovery, and the objection may be taken either by plea in abatement, or as a ground of nonsuit, upon the trial, under the plea of the general issue.

4. EVIDENCE — *variance between and declaration — effect of.* Where, in an action on a contract, the declaration alleges, that four persons, plaintiffs, made it, with the defendant, and the proof shows, that but three of them made it, or that the four named, together with another not named, made it, such allegations are not supported by the proof, and the variance is fatal. A plaintiff, under the plea of the general issue, is bound to prove his case as stated in his declaration.

5. PARTNERSHIP — *what constitutes — effect of particular agreements between parties.* Where A and B, as partners, and C and D, as partners, comprising distinct firms, make a contract with E, to furnish him a certain quantity of wool, and agreed among themselves, to share profit and loss in the speculation, each firm to furnish a certain proportion of the wool, — *Held*, that as to such transaction, they could not be considered as partners between themselves, or as to third persons.

APPEAL from the Circuit Court of De Witt county; the Hon. JOHN M. SCOTT, Judge, presiding.

The facts in this case are stated in the opinion.

Messrs. WILLIAMS & BURR and Mr. L. WELDON, for the appellant.

Messrs. MOORE & GREEN for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit brought in the De Witt Circuit Court by James De Land, Edward De Land, Jonathan Hall, Henry Magill, Robert Magill, Samuel Magill, and William Magill, against Thomas Snell, on a contract of sale, made July 1, 1864, by them to Snell, of thirteen thousand pounds of wool, at eighty cents per pound, to be delivered in a reasonable time, with an averment, that the plaintiffs did sell and deliver to the defendant in pursuance of the contract, on the 1st day of August, 1864, thirteen thousand nine hundred and forty-nine and one-half pounds of wool.

The plea was non-assumpsit with leave to give any matter in evidence which could be pleaded by way of set-off, and if a balance was found in favor of the defendant, the judgment should be entered for him as on a special plea of set-off. It was also agreed, that the defendant's contract with the plaintiffs was for twenty thousand pounds of wool at eighty cents per pound, and that at the time the wool should have been delivered, and at the place of delivery, it was worth from one dollar to one dollar and five cents per pound, and that defendant was damaged by the non-compliance of the plaintiffs to the extent of twenty-five cents per pound on seven thousand pounds. It was further agreed, that the contract was that the plaintiffs were to furnish to the defendant twenty thousand pounds of wool, if they had it, or could get it; and that they did have it, and have got it, and claims a judgment over for damages to the extent of twenty-five cents per pound, on seven thousand pounds of wool.

We understand this agreement to be, that the notice under the general issue, shall embrace all the matters above stated, as subjects of inquiry in the cause, leaving open the question of the rights of the plaintiffs to sue jointly.

The issue was submitted to the court, without a jury, who found for the plaintiffs, and assessed the damages at $729.60. A motion for a new trial was made and denied, and exceptions

taken. A judgment was rendered for the amount of this verdict, to reverse which, the cause is brought here by appeal.

The errors assigned are in finding the issues for the plaintiffs and in overruling the motion for a new trial.

On this assignment of error, the first point made by appellant is, that the proof does not show a joint interest in the plaintiffs in this contract.

The rule on this subject is well settled. If plaintiffs sue as joint contractors, they must show a joint interest in the contract. The appellees' counsel admit this to be the common law principle, but insist that section 7 of the act entitled "Evidence and depositions" (Scates' Comp. 256, ch. 40), has changed the common law in this respect; that the names and number of the contractors are presumed to be right in the absence of any plea in abatement, or, unless the defendant proves on the trial that the plaintiffs are too many or too few, or that their names are different.

That section was not designed to change the rules of pleading, but simply dispenses with certain proofs, plaintiffs suing as partners, or as joint obligees or payees, were required to make, at common law, under the general issue pleaded. It is a rule as old as the science of pleading itself, that in declaring in actions on contracts there must not be too few or too many plaintiffs. If there be, it is fatal to a recovery, — the action must fail, and this objection can be availed of, either by plea in abatement, or as a ground of nonsuit on the trial upon the plea of the general issue. 1 Ch. Pl. 8; *Murphy* v. *Orr*, 32 Ill. 489. It is most proper upon the plea of the general issue, for under that plea the plaintiff is bound to prove his case as he has stated it in his declaration. The allegations and proofs must correspond — alleging that four persons, plaintiffs, made the contract declared on, with the defendant, is not supported by proof that but three of them made it, or that the four named made it, together with another person not named. The rule is, that the non-joinder or misjoinder of plaintiffs may be taken advantage of under the general issue. 1 Ch. Pl. 20.

Section 7 of chapter 40 furnishes a rule of evidence, or rather,

dispenses with proof of certain facts, which, previous to the statute, was required. It furnishes no rules of pleading, leaving them as at the common law; this is apparent from the proviso to the section. A defendant may show, as at common law, that too many persons, or too few, are joined as plaintiffs, and this under the general issue. Here there are too many plaintiffs. They are named as James De Land, Edward De Land and Jonathan R. Hall, and the four Magills. Hall, the witness, testifies that James De Land, Edward De Land and Jonathan R. Hall, were partners, and that the four Magills were partners, as a distinct partnership, as we understand it — not that the De Lands, Hall and the Magills were partners *inter se se.* He said he knew that James De Land and Jonathan R. Hall were partners in trading in stock and wool, in the summer of 1864. In this branch of business Edward De Land is not named as a partner.

Another witness for plaintiffs, Mr. Fenderstien testified, that Jonathan R. Hall had an interest in the wool that James De Land had in his cellar in 1864, and which Snell got. He also knows, that the Magills had an interest in that wool, and were in with the De Lands in trading at that time. This witness does not name Edward De Land as a partner, or as having any interest in this contract, nor is it shown, that the Magills had the least particle of interest in it. They merely furnished De Land wool to fill out his contract with Snell, and nothing more. It is in that sense, Fenderstien is to be understood. The Magills made no contract with Snell to furnish wool, — there is no proof of it, but De Land did, and, to fill his contract, he was obliged to apply to Magill for his wool, which was in his cellar, ten sacks of which he delivered Snell's agent on De Land's contract.

Admit the De Lands and Hall were partners, and the Magills partners: they composed distinct firms; and, if they agreed among themselves to share profit and loss in this wool speculation, each firm furnishing a certain proportion of the wool, that did not make them partners in this transaction, and they would not be liable as such between themselves or to third persons, and of course not to the defendant, if he was suing for a breach of the contract. *Smith* v. *Wright*, 2 Sandf. (N. Y.) 113; *Patti-*

son v. *Blanchard*, 1 Seld. 186; *Bingham* v. *Dana*, 29 Vt. 1; cited in 3 Kent Com. (Comstock's ed.) p. 20, note.

Both these objections were made by the appellant on the trial, and were overruled. We are of opinion they were well taken, and the court should have allowed them. The judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

CHARLES C. STEPHENS
v.
ILLINOIS MUTUAL FIRE INSURANCE COMPANY.

1. INSURANCE — *of a mortgage interest — what constitutes the same — agreement to redeem — effect of — rights of mortgagor.* A owned certain premises and mortgaged them to B; afterward, he procured insurance upon them, and then sold to C, at the same time assigning to him the policy of insurance, by consent of the company. B commenced suit for the foreclosure of his mortgage, making A and C parties, but the litigation was subsequently compromised, by an agreement in writing, that B should take a decree for an amount equal to the face of the claim, and, in consideration therefor, A and C should have *two years* from the day of sale to make redemption. A decree was entered, providing for redemption, within *fifteen months;* and sale was accordingly had, and the premises bid in by an agent of B, the mortgagee, and afterward, in about fourteen months and eight days after the sale, were destroyed by fire. In an action by C against the insurance company, to recover the amount of the insurance, *held*, that, had a third person, for a valuable consideration, and without notice, acquired title under the decree, within the two years, his rights would be governed by it, without reference to the ageeement.

2. The premises having been purchased by the plaintiffs in the foreclosure suit, as against them, the agreement is operative.

3. The proof shows, that the decree and agreement were made together, one being the consideration for the other, and there is no inconsistency in permitting both to stand, it being the undoubted intention to give the defendants two years' redemption.

4. Under this agreement, the subsisting relation of mortgagor and mortgagee was substantially continued, and a tender by defendants of the redemption money at any time within the two years, would have been good.

5. At the time of the fire, C's position was that of a mortgagor, with a right to redeem; and, as such, he had a substantial, insurable interest, which estate could not have been lost until the expiration of the time for redemption.

6. It was not necessary, that the insurance company should have been a party to the agreement, and the proceedings in the suit of foreclosure and sale determine clearly that C did not thereby lose his right of redemption.

7. SALE — *at sheriff's or master's sale — when purchaser acquires new title.* In this State, a purchaser at sheriff's or master's sale acquires only a lien; no new title vests until the period of redemption has passed.

8. DEED — *relates back to commencement of lien.* But, his deed will relate back to the beginning of his lien, in order to cut off intervening incumbrances. The title only becomes absolute when the right to a deed accrues.

9. MORTGAGOR — *estate of, before and after decree and sale.* By a sale under a decree of foreclosure, the estate of the mortgagor remains the same, with this qualification, that the decree and sale, the amount and time of redemption, have become fixed, and a failure to redeem within the allotted time, divests his estate.

10. SAME — *may insure full value of the property, and having right of redemption, may recover loss.* It is well settled, that a mortgagor may insure to the full value of the property, and recover the sum insured, if, at the time of the loss he had the right of redemption; and this, even though the premises have been taken by the mortgagee.

WRIT OF ERROR to the Circuit Court of Hancock county.

The facts in this case are fully stated in the opinion.

Mr. N. BUSHNELL, for the plaintiff in error.

Mr. H. W. BILLINGS, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by Stephens, against the Illinois Mutual Insurance company upon the following state of facts: On the 25th of June, 1858, the firm of Banks, Bell & Co., being the owners of certain mill property, executed a mortgage thereon for $3,400, to a firm called Gaylord, Son & Co. On the 9th of November, 1859, Banks, Bell & Co. procured from the Illinois Mutual Fire Insurance company, a policy of insurance on the mill and fixtures, for the sum of $5,000, expiring

November 9th, 1865. On the 8th of December, 1860, Banks, Bell & Co. sold and conveyed the premises to the plaintiff, Stephens, and with the assent of the insurance company, assigned to him the policy. In May, 1861, Gaylord, Son & Co. commenced a suit to foreclose their mortgage, making Banks, Bell & Co., and Stephens, parties defendant. On the 3d of June, 1862, a decree was rendered for the sale of the premises, and on the 2d of August, 1862, they were sold at public auction for $4,468, and bid in by the agent of Gaylord, Son & Co., the bid being applied on the decree. On the 10th of October, 1863, fourteen months and eight days after the sale, the mill and fixtures were destroyed by fire. This suit is brought by Stephens to recover the insurance.

There is no controversy about the facts, and the only question presented by counsel for our decision is, whether the interest of the plaintiff in the premises was so far divested by the sale, under the decree of foreclosure, that he incurred no loss from the fire, and is therefore entitled to no indemnity.

In order to determine this, we must advert to another fact in the case, upon which exclusively we base our decision. It appears that two of the members of the firm of Banks, Bell & Co. filed answers to the bill of foreclosure, in which they set up a partial failure of consideration in the notes secured by the mortgage, and that on the 3d of June, 1862, the parties compromised the litigation by an agreement, that the complainants should take a decree for the amount due on the face of their notes, and that in consideration thereof, the defendants should have two years from the date of sale in which to make redemption.

This agreement was reduced to writing and filed among the papers in the case, and thereupon, and on the same day, a decree was entered. It is true, this decree directs the special commissioner to make a deed if the premises are not redeemed within the statutory period of fifteen months. If third persons, for a valuable consideration, and without notice, had acquired title under the decree within the two years, their rights would doubtless have been governed by it, without reference to this

agreement. But the premises were bid in at the sale by the agent of the complainants, and transferred to them, and as against them the decree can not be considered so far to merge the agreement as to render it inoperative. It is in proof by the counsel for the complainants in that case, who was also the special commissioner for making the sale, that the agreement and decree were all one transaction, one being the consideration for the other, as indeed appears by the face of the agreement itself. Why the decree gave only fifteen months for redemption, after two years had been agreed upon, does not appear, but it may well have been from apprehension of possible peril to the title, or of complication with other judgment creditors, if the decree on its face departed from the statutory period of redemption. There is, therefore, no such inconsistency between the decree and the agreement that they cannot both be allowed to stand. They were made together and in connection with each other, and the witness who was counsel swears that neither would have been made without the other. Notwithstanding, then, the decree directed a deed to be made at the end of fifteen months, it was the undoubted intention of the parties that the defendants should have two years for redeeming, and, notwithstanding the commissioner's deed, if the defendants in that suit had tendered to the complainants the redemption money within the two years, and in case of refusal had filed their bill, there can be no question, on the proof in this record, but that they would have been entitled to a decree for redemption. It is unnecessary, then, to consider what were the rights and relations of these parties under the statute. Under this agreement, the then subsisting relation of mortgagor and mortgagee was substantially continued. The legal title passed by the commissioner's deed, which was not made known until after the fire; but that legal title was held by the complainants subject to a right of redemption within two years from the sale.

At the time of the fire, then, the position of Stephens was substantially that of a mortgagor, with a right to redeem; or, more accurately, it was the same he would have occupied if the premises had been destroyed by fire two months and eight

days after the sale, leaving him more than nine months for redemption.

That, in this position, he would have had a substantial, insurable interest, does not admit of doubt. His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this State, the purchaser under a sheriff's sale, upon judgment and execution, or at a master's sale, on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening incumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact, that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification, that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time. That a purchaser under a judgment and execution acquires no new estate, but only a lien until the expiration of the period of redemption, has been several times settled by this court. *Sweezy* v. *Chandler*, 11 Ill. 445; *Johnson* v. *Baker*, 36 id. 98.

At the time, then, of the destruction of this mill, Stephens was a mortgagor, and it is the settled law, that a mortgagor may insure to the full value of the property, and recover the sum insured, if he had a right of redemption at the time of the loss, even though the premises have been taken out of his hands by the mortgagee. Angell on Insurance, § 58, where numerous cases to this effect are cited in the notes. That the right of redemption was in the present instance a valuable estate, is apparent from the record, which shows the mill and fixtures to have been worth, at the fire, from fourteen to sixteen thousand dollars, while to redeem them would have required but about

five thousand. This plaintiff has, therefore, been really damnified by the fire to an amount largely beyond the insurance.

It is objected, by the counsel for the defendant in error, that the insurance company was no party to the agreement to extend the redemption for two years, and cannot, therefore, be affected by it. The objection, however, is not tenable. The insurance company is sued on a policy. It defends by saying, that the plaintiff, though he once had an insurable interest, has lost it through the foreclosure of a certain mortgage older than the plaintiff's title. Now, whether the plaintiff has thus lost his title, must depend on the proceedings in the foreclosure and sale. To determine this question these proceedings are put in evidence, and on examining them, we find this agreement as a very material portion of that transaction, which the company has itself introduced to show a divestiture of title. The company seeks to show that the right of redemption was lost under a judicial sale, but the evidence offered by it shows it was not lost.

The plaintiff is entitled to a judgment for the amount of the policy and interest, from the third of February, 1864, that date being three months after notice of the loss was given. The judgment of the Circuit Court is reversed and the cause remanded, as we deem it better the judgment should be entered in the court below, notwithstanding the stipulation of the parties.

Judgment reversed.

PHINEAS W. TAINTOR
v.
ISAAC KEYS *et al.*

1. MORTGAGE—*a deed in form—when.* It is the settled doctrine in equity, that the form of a transaction will not be regarded, but the intention of the parties must control. If the transaction was in fact a loan or security for money owing, although the conveyance be absolute on its face, still it will be treated as a mortgage, but that fact must be satisfactorily shown.

Statement of the case.

2. CHANCERY — *sworn answer.* Where a bill charges a deed, absolute on its face, to be a security for a loan of money, and the answers, under oath, clearly and distinctly deny the allegation, and insist, that it was a sale, the answers are evidence and must be overcome by preponderating evidence before relief will be granted.

3. Where a person, holding a certificate of purchase, assigns it to a third person, and he agrees, if the debtor will pay him a specific sum, by a day named, that he will convey him the property, and give him a bond for the purpose, this is in form a purchase from one person and a sale to another. It is unlike a loan of money or pre-existing debt, and the debtor conveys real estate by a deed absolute on its face, and the creditor gives a bond for a reconveyance on the payment of the money. In such a case, the transaction would appear to be a conveyance with a defeasance.

4. EVIDENCE — *to overcome a sworn answer.* Where a sworn answer denies that the transaction was intended as a mortgage, there must be full proof, that it was a loan and security, to overcome the answer; loose and indefinite statements are insufficient.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. EDWARD Y. RICE, Judge, presiding.

This was a suit in equity brought by Phineas W. Taintor, in the Sangamon Circuit Court, against Isaac Keys, David L. Phillips, Alexander Edgeman and George Carter. The bill alleges that complainant was, on the 15th day of July, 1861, the owner of the equity of redemption of forty acres of land lying near the city of Springfield. That this tract of land had been sold by the master in chancery on the 16th day of July, 1860, on the foreclosure of a mortgage for the sum of $3,602.31, to Milton Hay and Joshua F. Amos.

That on the 15th of July, 1861, complainant conveyed the land to Keys and Phillips, and they executed to him a bond for a reconveyance on the payment of $4,953.16 within twelve months. The bill charges, that the transaction was a loan of money, and a security for its repayment. That Keys came to complainant, and solicited him to borrow the money, to which he consented.

The bill alleges, that complainant tendered to Keys and Phillips $4,359, the amount loaned, with interest, but that it was not accepted. The bill prays, that complainant may be permitted to redeem, and that an account be taken of a variety

of transactions, alleged to have occurred in reference to the property after it came into the hands of Keys and Phillips.

The defendants Keys and Phillips answered, denying that the transaction was a loan or security, but insisting that it was a purchase of the property, and that they had paid the money to Hay and Amos on a purchase of the master's certificate from them, and that they took an assignment to themselves, and that they had contracted with complainant to sell him the property, and give to him a bond for a deed on the payment of the purchase money in one year from that date.

The case was heard on the bill, answers, replications, exhibits and proofs, and the court dismissed the bill, and refused the relief. To reverse that decree complainant prosecutes this writ of error.

Messrs. W. H. HERNDON, and C. S. ZANE, for the plaintiff in error.

Messrs. PALMER & HAY, and MORRISON & EPLER, for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

The question is presented by this record, whether the assignment of the certificate of purchase by Hay, to defendants in error, and their simultaneous execution of the bond for a conveyance of the property to plaintiff in error, is to be treated as a mortgage, or a purchase from one person and a sale to another. The form of this transaction is certainly that of a purchase and a sale, and not that of a mortgage. Had plaintiff in error conveyed to defendants in error, and they had given back to him a bond for a reconveyance, then it would have been in form a conveyance with a defeasance, and the transaction would then have been in form a mortgage.

It has, however, long been the settled doctrine, that the form of the transaction will not control, but the intention of the parties must determine the nature of the transaction. If

intended as a loan and security for the money loaned, it will be treated as a mortgage and a redemption allowed. For the purpose of giving the character of a mortgage to this transaction, it is alleged in the bill, that defendants in error proposed to loan the sum necessary to redeem from the sale to Hay, to plaintiff in error, and take the assignment of the certificate as security for the repayment of the money. That the loan was effected at twenty-four per cent interest for one year; that the assignment was made, and that a bond for a conveyance was given to plaintiff in error, on the payment of the note given for the sum loaned, with the interest added in, together with any other claims they might hold against him.

The answers were called for under oath, and were filed, duly sworn to by defendants in error. They, by their answers, deny in the most positive and unequivocal manner that it was a loan, or understood or intended to be such; but state that it was a purchase from Hay, and a sale to plaintiff in error. That he applied to borrow money but they emphatically refused to loan it, or to advance it on interest; and deny that any estimate of any per cent was ever made in reference to the money they paid to Hay, and that there was nothing said when the transaction was closed, with reference to interest or per cent on the money. But they agreed if he would pay to them the gross sum for which the note was given, at the specified time, they would convey the land to him.

Does the transaction as it occurred afford evidence to overcome the sale in form, and the sworn answers of defendants in error? This transaction is not like a conveyance from one person to another, and at the same time giving an obligation to convey it back to the grantor upon his performing certain acts. But on its face it assumed the appearance of ordinary purchases of property from one person, and its immediate sale to another, for an advanced price. And then there is to be evercome the sworn answers, which deny that it was intended to be a loan; and the discovery is called for under oath and it thereby became evidence in the case. There seems to be no evidence to overcome these answers.

This case is unlike that of *Snyder* v. *Griswold*, 37 Ill. 216, and of *De Wolf* v. *Strader*, 26 id. 225, and other cases previously before this court, which were held to be mortgages. In those cases it appeared, either that there was an advance of money to, or a pre-existing debt owing from, the grantor to the grantee, and a bond given for a reconveyance of the premises to the grantor when he should refund the money. Nor, so far as this record discloses, was the transaction accompanied with declarations from which a loan could be inferred.

In the case of *Wynkoop* v. *Cowing*, 21 Ill. 571, it was held, that where the sworn answers of the defendants denied that the transaction was intended to be a mortgage, there must be full proof that it was a loan and a security, to overcome the answers; that loose and indefinite statements were not sufficient. Tested by this rule, we in this case fail to find proof of that character. If there be evidence which militates against these answers it is slight, and wholly fails to establish the allegations of the bill. These answers are, directly and unequivocally, responsive to the bill, and deny its allegations. The bill was not sustained by the evidence, and the court below could not have done otherwise than dismiss it.

In the view we have taken of the case we deem it unnecessary to consider other transactions presented by the bill. They would only be important had the transaction been shown to have been a mortgage. It might in such a case have been necessary to consider them, in fixing the amount required for a redemption. The bill, had it been framed to enforce a specific performance of a contract, or if such relief were sought under the general prayer in this bill, could not be maintained, as the requisite amount was not tendered in time, and from the delay in exhibiting the bill, such changes have taken place in the situation and value of the property, that the relief would not be granted on the case presented by this record.

The decree of the court below must therefore be affirmed.

Decree affirmed.

JOHN B. BOWMAN *et al.*
v.
LOUISIANA ST. JOHN.

PLEADING. A, who was city marshal, arrested B for violating a city ordinance against obstructing a street. In an action of trespass by B against A for making the arrest, A pleaded justification under the ordinance; but the ordinance, as set out in the plea, simply declared the obstructing of a street a misdemeanor, without declaring a penalty, or giving to municipal authorities jurisdiction of the offense. On demurrer to the plea,—*held*, that such plea did not show that the city was entitled to recover a fine, impose a penalty, or issue process of any kind for the offense, and was therefore bad.

APPEAL from the Circuit Court of St. Clair county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Mr. WM. H. UNDERWOOD, for the appellants.

Mr. G. KOERNER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of trespass, assault and battery, brought in the St. Clair Circuit Court to the October Term, 1866, by Louisiana St. John, against John B. Bowman, and Timothy Canty.

There were two counts in the declaration in the usual form, to which the defendants pleaded not guilty, and a special plea of justification, setting out an ordinance of the city of East St. Louis, under which the arrest of the plaintiff was sought to be justified.

The ordinance is as follows: "SEC. 11. Whoever shall, in this city, obstruct the free passage way of any street, alley or wharf, by the deposit of wood, stones, earth or other substances (building materials excepted during the necessary time required for the erection of buildings, and a reasonable time thereafter), or by having articles loaded or unloaded, railroad cars, locomo-

tives in the streets, and shall fail to remove said obstructions in a reasonable time, shall be guilty of a misdemeanor." The plea then alleges, that the offense was for building a wooden fence just before the time when, etc., by the plaintiff over and across the street mentioned in the warrant, which the defendant Canty, as city marshal, had in his hands to execute, and that he, as such marshal, gently laid his hands upon the plaintiff, to take her by virtue of this warrant, and did then and there take the plaintiff before the city judge, who issued the warrant, with the assistance of Bowman, as ordered to do by the city marshal, using no more force than was necessary, etc.

A demurrer was sustained to this plea, and which is the error assigned.

The demurrer was well taken. The plea was not good. The ordinance as set out in it, simply declares obstructing a street a misdemeanor, without declaring a penalty, or giving the city judge jurisdiction of the offense. This court cannot know from this plea, that the city was entitled to recover a fine, or impose a penalty for this offense, or to issue process of any kind for the offense.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

SAMUEL P. SHANNON, Administrator, etc.

1. VERDICT — *against the evidence.* This court has repeatedly held, that unless the verdict of a jury is clearly against the evidence, it will not be disturbed. It is their province to pass upon the issues of fact, and interference will only be had to prevent a plain perversion of justice.

2. SAME — *when there is conflicting testimony.* When there is a conflict of testimony among witnesses with equal means of information, and standing equally unimpeached, and the issues have been fairly left to the jury, .heir verdict will not be disturbed, if the record contains evidence upon which it can be reasonably based, even though there is adverse testimony which would seem to preponderate.

Syllabus.

3. EVIDENCE — *concerning reputed condition of machinery.* In an action to recover damages, caused by the explosion of a certain locomotive engine, the testimony of the employees of the company using it, that, among them, such engine had always been considered unsafe, is competent, for the purpose of showing that the person having care of the machinery of the road knew, or might have known, by reasonable diligence, that it was not safe.

4. SAME — *relating to theory and opinion.* Evidence, relating to mere matters of theory and opinion, though often valuable, loses its weight when the witnesses are so circumstanced, that they have a strong interest in propounding one opinion or theory, rather than another.

5. RAILROAD COMPANIES — *must know the condition of their machinery.* Where a certain locomotive engine was reported to the employees of the company having charge of its machinery, as unsafe, and after such report, they failed to ascertain its condition, the company cannot claim exemption by reason of such negligence on the part of its agents.

6. SAME — *actual knowledge unnecessary — notice of bad condition sufficient* If a locomotive engine, in use by a company, is unsafe, actual knowledge of the fact, by the persons having charge of the machinery of the road is not necessary, in order to charge the company with the same liability as if such persons had had actual knowledge of the fact; it is sufficient if they had received such reports of its bad condition, as ought to have given them, by proper diligence, knowledge of the truth.

7. SAME — *will be held to the highest degree of vigilance.* Railroad companies will be held to the highest degree of vigilance in regard to the condition of its machinery, and if the condition of an engine, in fact insecure, can be ascertained by the exercise of the highest diligence, the company will be held responsible, if it neglects to find out the fact.

8. DAMAGES — *nominal.* Under our statute, where a person has met with death caused by the wrongful act, neglect, or default of another, whenever there are next of kin, an action will lie for the recovery of at least nominal damages.

9. STATUTE — *interpretation of phrase "next of kin."* The phrase "next of kin," used in the statute, is a technical, legal one, and was used by the legislature in its technical sense; meaning here what it means elsewhere. And any rule laid down by this court, fixing "next of kin" within certain degrees of consanguinity, would be purely arbitrary, and mere judicial legislation.

10. DAMAGES — *measure of.* Under the statute, which authorizes an action to be brought for the use of the widow or next of kin, where a person has met with death, caused by the wrongful act, neglect, or default of another, the recovery, in such case, can only be for the pecuniary loss and damage suffered, and not for the bereavement.

11. SAME — *must be pecuniary loss.* In such case, no matter how near the degree of relationship, unless there has been pecuniary loss, only nominal

damages can be given; but where there has been such loss, compensation must be given, no matter how remote the degree of relationship.

12. SAME — *where deceased was a minor.* So, also, compensatory damages must be given, if the deceased was a minor, leaving a father entitled by law to his services.

13. STATUTES — *of a State — construed by its courts.* The construction of State laws, when they do not interfere with the Constitution or laws of the United States, belongs to the State courts.

14. DAMAGES — *measure of.* The question of how damages are to be measured, must be largely left (within the limit of the statute) to the discretion of the jury, to whom the law commits the question, and who can give such damages as they shall deem a fair and just compensation. What the life of a person is worth in a pecuniary sense to another, is a question which does not lie within the limits of exact proof, and hence the subject has been confided to the jury; the court to see, that their finding be not the result of passion or prejudice.

15. SAME — *what not considered excessive.* In an action to recover damages for the death of a person, caused by the explosion of a locomotive engine, where the proof showed, that the deceased left a father fifty years old, who had little property beside his homestead; that when not on the road he had lived with him, and contributed to the support of the family; and that upon the father's life there was a policy of insurance for the benefit of the mother of deceased, upon which deceased had paid the premiums, and had promised to keep the same paid, a verdict in such case for $2,000 is not excessive damages.

16. EVIDENCE. In this case, the deceased was a brakeman on the road, and it was held, that proof that the engineer had, on a previous trip made on the road, carried more steam than the rules of the company allowed, was inadmissible.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

The facts in this case are fully stated in the opinion of the Court.

Messrs. WILLIAMS & BURR, for the appellant.

Mr. W. H. HANNA, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action on the case brought under the statute by Samuel P. Shannon, as administrator of Joseph W. Shannon,

deceased, for the benefit of the next of kin, against the railway company, for wrongfully causing the death of the said Joseph, who was a brakeman upon said road. The plaintiff below recovered judgment for $2,000 and the defendant appealed. The death was caused by the explosion of the boiler of the locomotive while the train to which the deceased belonged was in motion, on the 18th of May, 1865. The suit is brought upon the ground, that the boiler was unsafe and was known to be so to the appellant.

It is urged by the counsel for the appellant, in a very elaborate review of the testimony, that the judgment should be reversed because the verdict was against the evidence on the main point — the insecurity of the boiler. The rule of this court has been so often announced as hardly to need repetition — that, unless the verdict is clearly against the evidence, and can be considered only as the result of passion, prejudice or a palpable misapprehension of the facts, it is not the province of the court, for that reason, to interfere. The law entrusts the trial of issues of fact to a jury, and there the court must leave it, except so far as may be necessary to interfere to prevent a plain perversion of justice. Where the record discloses a conflict of testimony among witnesses standing equally unimpeached, and with equal means of information, and the issues have been fairly left to the jury by the instructions of the court, we must necessarily say, in regard to the verdict, that it is the province of the jury to determine the weight of testimony, and if the record contains evidence upon which their finding can be fairly and reasonably based, we are not at liberty to set it aside, even though there is other and adverse testimony which, as we read it in the record, seems to us rather to preponderate. There is much truth in the remark so often made, that the credibility of conflicting witnesses can be much better determined by a jury who sees and hears them, than by an appellate court which merely reads their testimony as embodied in a bill of exceptions.

As to the main question in the present case, it is undeniable, that the evidence is of that conflicting character, upon which it is the peculiar province of a jury to decide. Hugh McGee

testified, that he had been a boiler maker thirteen years; that he worked in the machine shops of the defendant during the summer of 1864; that while there he worked on the engine in question, and put some stay-bolts in the side of the fire-box; that it was not braced as he would like to see a first class engine braced, and that after the explosion he examined it, and found a crack, apparently an old crack, running from the edge of the sheet that had burst. He further says, that he called the attention of the master mechanic, and the foreman boiler maker to the crack, and they examined it. They, however, when called by the defendant, swore that they never made an examination of the boiler with McGee, and that, although they carefully examined it, they found no old crack.

The plaintiff also read the deposition of John W. Johnson, who testified, that he had been a boiler maker over thirty years, and was foreman in the boiler shop of the defendant at Bloomington. This locomotive was repaired while he was in the shop in 1864, and was about finished when he left. The stay bolts inside the boiler were very weak, and he took them out and put in as many new copper ones as they would allow him, and put in a number of extra ones where none had been before. He considered the boiler very weak, and the copper of the fire-box too light. Did not consider it safe, and cautioned one of the men that saw it about the boiler's weakness, and told the master mechanic of its weakness. He says, he does not think the boiler was safe for the business it had to do. We understand this witness as referring to the condition of the boiler after it was repaired as well as before.

Edward Stone, also called by plaintiff, had been a boiler-maker for thirty years, had worked on the boiler in question; the side sheets of the fire-box were bulged in three inches; the stay bolts were seven or eight inches apart in some places, and should not have been more than three, or four, or five. He put in new stay bolts where it was bulged. The boiler came upon the road in August or September, 1863, and the repairs referred to by this witness were made three or four months after that time. He says he saw the boiler after the explosion, and does

not think it was properly braced in the crown-sheet. Did not consider the boiler safe.

Besides these boiler makers, the plaintiff called several locomotive engineers connected with the road, and several machinists who worked in the shops, and proved by them, that this engine had had a bad reputation from the time it came upon the road, and that it was not considered safe. This evidence of reputation was admitted, and properly, for the purpose of showing that the persons having charge of the machinery of the road knew, or ought to have known by reasonable diligence, that this locomotive was not safe. It was also found that the boiler, when in use, emitted a peculiar cracking or snapping sound, which was unusual, and was made a subject of remark among the engineers, one of whom swears he did not think the boiler safe, and did not like to run this engine, and he several times reported it to the foreman of the round-house.

The defendant called the master mechanic, the foreman of the round-house, the foreman of the boiler shop, and the foreman of the blacksmith shop. The deposition of one of the firm in Philadelphia, that manufactured the engine, was also taken. All these witnesses testify minutely and positively as to the construction and condition of the boiler, swearing that it was made of the best materials, and in the best manner, and had been put in thorough repair, and that the boiler and engine were of the first quality. Two of these witnesses also swear, that from certain indications about the boiler after the explosion, they were of opinion that the cause of the explosion was the carelessness of the engineer, in allowing the water to get too low in the boiler. All persons who have had much experience in jury trials must have noticed how apt are witnesses, called as experts, to speak with great confidence, when seeking to ascertain the unknown cause of certain effects, by appearances which, to others, convey little meaning. Such evidence is often valuable, but as it relates to matters of theory and opinion merely, it is entitled to less weight when the witnesses are so circumstanced that they have a strong interest in propounding one opinion or theory rather than another. In the present

case, conceding the witnesses on both sides to be equally honest, it was not improper for the jury to consider that those for the defendant would naturally be inclined to adopt a theory of the explosion, which would relieve them from the charge of having been remiss in looking to the safety of the boiler.

We have not, however, stated this evidence for the purpose of showing that the jury could have rendered no other verdict. On the contrary, the witnesses for the defendant testify with so much minuteness and intelligence as to leave us in great doubt whether this boiler was unsafe or not, and it is precisely because the evidence is conflicting and does leave this question in doubt that it would not be proper for us to set aside the verdict on the ground that it is clearly against the evidence. The testimony of the plaintiff's witnesses as to the insecurity of the boiler, it must be admitted, receives some support from the fact, that the boiler did finally explode, killing not only the brakeman, for whose death this suit is brought, but the engineer. The explosion resulted either from the inherent weakness of the boiler, or from the carelessness of the engineer. Amid this conflicting evidence the jury would naturally regard the explosion as more likely to have been produced by the former cause, than by a degree of carelessness on the part of the engineer which would be attended with the most deadly peril to his own life.

As to the other question upon the evidence, the knowledge of the company's agents that the boiler was not considered safe, little need be said. It is not only proved, that the engine had a bad reputation among the employees, but Lighthall, a locomotive engineer, who had run the engine, testifies that he reported it several times to the foreman of the round-house and the superintendent of machinery, as unsafe. If, after receiving these reports, they did not inform themselves as to the condition of the engine, they ought to have done so, and can claim no exemption by reason of their negligence.

It is also insisted that the court erred in refusing the following instructions:

"Unless the evidence for the plaintiff preponderates over that of the defendant as to the fact of the engine being unsafe, and that the defendant's employees, whose duty it was to know it, did know it, they will find for the defendant.

"Even if the jury should believe from the evidence that the engine was unsafe, and that the defendant's employees, whose duty it was to know it, did know that it was unsafe, yet if they further believe from the evidence that the plaintiff's intestate was over twenty-one years of age and that he was in no way indebted to the plaintiff or any one else, and that the deceased left no widow or children nor descendants in any degree, then there was no one who had any legal interest in his life and the plaintiff cannot recover in this case."

The first of the foregoing instructions was properly refused. Even if the employees of the company did not positively *know* that the engine was unsafe, yet, if it was in fact unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led, by the use of proper diligence, to a knowledge of the facts, the company must be held to the same liability as if their agents had actual knowledge. It is not enough to say, that a railway company has no right to use engines known to be unsafe. It must be held to the highest degree of vigilance in this regard, and if the condition of a locomotive, in fact insecure, can be ascertained by the exercise of the highest diligence, the company must be responsible if it neglects to ascertain the truth.

The question presented in the second of the foregoing instructions is one of some novelty. The statute upon this subject, 2 Purples' Statutes, 1245, Scates' Comp. 422, authorizes the suit to be brought for the exclusive use of the widow and next of kin. We do not perceive how the conclusion is to be avoided, that wherever there are next of kin the action will lie for the recovery of at least nominal damages. We know of no principle by which we are authorized to say that "the next of kin" must be within certain degrees of consanguinity. Any rule or limitation of that character which we should

endeavor to lay down, would be purely arbitrary, and mere judicial legislation. The phrase "next of kin," used in the statute, is a technical legal phrase, and we must suppose it to have been used by the legislature in its technical sense. It means here what it means elsewhere.

But, while the action may be brought in any case where there are next of kin, the more important question remains — what is to be the measure of damages? This court held in *The City of Chicago* v. *Major*, 18 Ill. 349, and again in *The Chicago and Rock Island Railroad Company* v. *Morris*, 26 Ill. 400, that the recovery can only be for the pecuniary loss and damage, and not for the bereavement. Nothing can be given as *solatium*. If then the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss for which compensation under the statute must be given. So, also, if the deceased was a minor and leaves a father entitled, by law, to his services.

It is said, on the authority of an unofficial report, that the Supreme Court of the United States have recently held, in a suit brought by the executors of Barron against the Illinois Central Railroad company, and taken to that court by a writ of error to the federal court of this district, that a suit cannot be brought under this statute for the benefit of the parents, brothers and sisters of the deceased, who was of age, alleging, as a reason, that they have no pecuniary interest in his life. While we entertain great respect for that court, we cannot agree with it in this view, if it has so held; and the construction of State laws, when they do not interfere with the Constitution or laws of the United States, belongs to the State courts.

We hold, then, that such next of kin as have suffered

pecuniary injury from the death of deceased, may recover pecuniary compensatory damages under this statute. How this pecuniary damage is to be measured, — in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of the jury. The law provides, that "they are to give such damages as they shall deem a fair and just compensation." What the life of one person is worth, in a pecuniary sense, to another, is a question incapable, from its nature, of exact determination. Although the wealth or poverty of the deceased may be important elements, they are not the only ones that enter into the problem. If the deceased was poor, the loss may consist in the fact, that his personal exertions can no longer support those dependent upon him. If rich, the loss may be nearly as great, in the deprivation of the care and management of his business or estate. In creating this right of action the legislature have confided to the jury a subject, that does not lie within the limits of exact proof. But, in this, as in all other actions, the court must so far supervise the verdict as to see that it is not the result of unreasoning prejudice or passion.

In the case at bar it is in proof, that the father of the deceased was fifty years old, and had little property besides his homestead; that the deceased lived at his father's when not on the road, and contributed to the support of the family, and that his father had an insurance policy on his (the father's) life, for the benefit of the mother of deceased, the premium upon which, $118, the deceased had paid, and promised to keep paid. The verdict was for $2,000, and we do not feel authorized to say it was too large.

The evidence offered by the defendant, that the engineer, on a previous trip, had carried more steam than the rules of the company allow, was properly excluded. It could shed no light on the issues in this case.

Judgment affirmed.

BREESE, J., dissents, on the ground, that, in his opinion, the weight of evidence greatly preponderates in favor of the safety and sufficiency of the engine, and on the further ground that the damages are excessive.

J. M. HURD, Administrator, etc.,
v.
JOHN W. and WILEY B. SLATEN.

1. JUDGMENT—*assignment of—effect of release by attorney of assignor.* A, on the 19th of December, 1860, executed his note with surety to B, upon the purchase of a certain judgment held by B, against C, who was considered insolvent, but the written assignment thereof was not made until July, 1862, and was then antedated to correspond with the note. At the date of this assignment, an execution was in the hands of the sheriff upon this judgment, and the attorney for B indorsed upon it a receipt in full, and directed it returned, which was done, whereby A lost all benefit of the judgment. B afterward died, and A paid the amount of his note given for the purchase of the judgment to B's administrator. A then filed his claim against B's estate for the amount of such judgment. *Held*, first, that B, by his assignment, covenanted that the judgment against C was unsatisfied, and was for the amount specified therein. Second, that, it appearing, by the proof, that A, at the time he purchased the judgment, knew of a tract of land out of which the amount could have been collected, but that by the act of B's attorney, and the insolvency of C, he had been deprived of all benefit of that for which he had paid value to B, the estate of B was liable for the amount of A's claim.

2. PROBATE COURT—*equitable jurisdiction over claims presented.* The probate court has equitable jurisdiction in the allowance of claims against the estates of deceased persons.

APPEAL from the Circuit Court of Jersey county; the Hon. DAVID M. WOODSON, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. A. L. & R. M. KNAPP, for the appellant.

Messrs. WARREN & POGUE, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a proceeding before the court of probate of Jersey county, wherein John W. Slaten and Wiley B. Slaten presented a claim against the estate of Matthew Darr, deceased, of which J. M. Hurd, the appellant, was administrator. The claim was allowed by the court to the amount of six hundred and twenty-eight dollars and fifty-seven cents. Hurd appealed to the Circuit Court, where the allowance was confirmed, to be paid in due course of administration. A motion for a new trial having been heard and overruled, an appeal is taken to this court.

The controversy grows out of this writing of assignment:

"Jersey Circuit Court, *Matthew Darr* v. *William Miller*. Judgment for $418.28 — note. March Term, 1859. In consideration of four hundred and twenty-eight dollars to me paid, I do hereby sell, assign and transfer to Wiley B. Slaten and John W. Slaten, the judgment above mentioned against William Miller for their use and benefit, hereby authorizing them to collect and enforce payment thereof in my name, or to their assigns or otherwise, but at their own costs and charges; and covenanting that the sum of four hundred and seventy-eight dollars, including the interest and cost, is due thereon. In witness whereof, the said Matthew Darr, party of the first part, hath hereto set his hand and seal, this 19th day of December, A. D. 1860."

At the date of this assignment an execution was in the hands of the sheriff, issued on this judgment, and the attorney for the plaintiff, Darr, indorsed upon it a receipt for four hundred and two dollars with interest, being in full of the judgment less sixteen dollars made by sale of land, and ordered the execution to be returned by the sheriff, which was done. It appears, it was known to the Slatens, that there was a tract of land subject to this judgment, out of which, by speedy measures, they could have made the amount. This was the moving cause with them for its purchase, and for which they executed their note with security to Darr for four hundred

dollars, payable three years after date with ten per cent interest from date until paid, and dated December 19, 1860, which the Slatens duly paid to the administrator of Darr. The writing of assignment was not in fact executed until some time in July, 1862, and was antedated to correspond with the date of the note, and with the agreement then made to assign the judgment.

It is clear that Darr, by this writing, covenanted that this judgment against Miller, in his favor, was unsatisfied, and that it amounted to four hundred and seventy-eight dollars, for which the Slatens paid value.

The execution which issued on this judgment on the 18th day of December, 1860, and then under the control of the attorney of record of Darr, having been receipted by him in full, and the execution, so returned, deprived the Slatens of the opportunity they had, when the assigment was agreed to be made to them, of collecting the judgment, and which, by the insolvency of Miller, has been wholly lost to them. It is but just and equitable, that Darr's estate should respond to the Slatens, and let the administrator pursue the attorney, if any ground of action exists against him. This court has said in several cases, that the probate court has a sort of equitable jurisdiction over claims presented before it for allowance. *Moore* v. *Rogers*, 19 Ill. 347; *Dixon* v. *Buell*, 21 id. 203; *Moline Water Power and Manufacturing Company* v. *Webster*, 26 id. 233.

It is on this ground, the appellees should recover. By the act of the covenantor's attorney, they have been deprived of a benefit for which they had paid value to the covenantor, and his estate ought to respond in damages. This is equitable.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Syllabus.

NANCY BATY *et al.*
v.
THOMAS C. W. SALE.

1. PRE-EMPTION RIGHTS. Individuals rely for the protection of their rights on the law, and not upon the regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect.

2. It is therefore sufficient to comply with the requirements of the law itself in the pre-emption of land, to entitle a party to his rights under that law, and any other conditions superadded by the commissioner of the general land-office, cannot affect his rights.

3. Hence, where a claim for pre-emption was filed, and the lands were afterward withdrawn from market for a short period, a failure by the pre-emptor to comply with a rule of the general land-office requiring the application to be renewed in such cases could not affect his rights, there being nothing in the law itself to require such a renewal. The officers of the land office are powerless to annex conditions or provisions to the law.

4. To avail himself of the benefits of the pre-emption laws, a person must comply with the conditions they impose. It is a favor bestowed only on the terms prescribed by the statute.

5. COMPUTATION *of time under the pre-emption laws.* Under the act of September 4, 1841, section 15, where a person settles upon and improves a tract of land, subject at the time to private entry, files his declaration of intention within thirty days thereafter, and then within twelve months after the date of such settlement, makes proof and payment as therein required, he may thus become the purchaser. The manifest intention is to give the pre-emptor an entire year, while the land was subject to entry, within which to make his final proof and to complete his purchase.

6. Hence, where land was temporarily withdrawn from the market, after a party had filed his declaration of an intention to pre-empt it, the officers of the land-office did right in excluding the time the land was not subject to entry, in computing the year within which he had the right to make his proof and enter the land.

APPEAL from the Circuit Court of Ford county; the Hon. O. L. DAVIS, Judge, presiding.

The facts of this case are fully stated in the opinion of the Court.

Messrs. WOOD and LONG, for the appellants.

1. The officers of the land-office had no right to decide that this land claimed by Baty was not subject to pre-emption. *Walker* v. *Hendrick*, 18 Ill. 571; *Elliott et al.* v. *Perisol*, 1 Pet. 340.

2. If land-officers undertake to grant pre-emptions to land in which the law declares they shall not be granted, they exceed their jurisdiction. *Wilcox* v. *Jackson*, 13 Pet. 511; *United States* v. *Gear*, 3 How. U. S. 120, 802; *Brown's Lessee* v. *Clements et al.*, id. 666. It follows, that if they refuse a pre-emption on lands which the law declares shall be pre-emptible, they equally exceed their jurisdiction, and there can be no rightful reservation or appropriation of the public domain without the express authority of law. *McConnel* v. *Wilcox*, 1 Scam. 354.

3. The time the lands were not in market for entry was properly excluded in computing the year allowed to the pre-emptor, Baty. *Clements* v. *Warner*, 24 How. U. S. 394.

Mr. E. S. TERRY, for the appellee.

1. The title of appellee is based upon a patent; where a patent is issued by the officers of the United States, the presumption is, that it is valid and passes the legal title. *Minter* v. *Crommelin*, 18 How. 87.

2. That the officers of the land-office decided the pre-emption by Baty to be regular, may be true; their decisions are of no binding force unless sanctioned by law, and may be assailed collaterally and reviewed by the courts. *Aldrich* v. *Aldrich*, 37 Ill. 37; *Lindsay* v. *Haws*, Black (U. S.) 559; *Comegys* v. *Vosse*, 1 Pet. 212; *Cunningham* v. *Ashley*, 14 How. 377; *Garland* v. *Wynn*, 20 id. 8; *Lyttle* v. *Arkansas*, 22 id. 192.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It appears from the record in this case, that Peter Baty, in his life-time, and about the 6th day of November 1855, erected

a building on the southwest quarter of section 17, in township 23, north of range 9 east, situate in Ford county, and moved into it and resided thereon until his death. About the 15th of the same month, he filed an application for a pre-emption on this land. Afterward, on the 11th day of December, 1856, he proved his pre-emption, which was allowed, and entered the land with a bounty land warrant and received a certificate of purchase. This entry was subsequently brought before the commissioner of the general land-office, who decided, that the pre-emption had been proved and the entry properly made.

Appellee, subsequently to the filing of the application to pre-empt the land by Baty, on the 29th of November, 1855, and while Baty was still in possession, entered the land, and he also received a certificate of purchase. Afterward a patent issued to him, on this entry. This led to a contest before the commissioner of the general land-office, as to which was the legal entry. The patent to appellee and the certificate of entry were re-called, and, on a hearing, the commissioner decided, that the land having been temporarily withdrawn from the market, after Baty filed his declaration of an intention to pre-empt it, he should have renewed his application; and, that his entry was therefore irregular and void, and delivered the patent to appellee. He subsequently brought an action of ejectment to recover the possession of the land, and Baty filed this bill to enjoin the action of ejectment, to have appellee's patent canceled and for general relief. The case was heard in the court below on the bill, answer, replication, exhibits and proofs, where the bill was dismissed. Baty having died before the hearing, the suit was revived in the name of the heirs, who prosecute this appeal and ask a reversal of the decree of the court below.

It is not contested, that the land was subject to pre-emption at the time Baty filed his application to be permitted to enter the land by pre-emption in the land-office at Danville, on the 15th of November, 1855. The commissioner of the general land-office, on the 5th day of May, 1856, issued a proclamation giving notice, that the office at Danville was discontinued, and,

that unsold lands in the district would be subject to entry at Springfield, after the officers at the latter place should give notice thereof. It is insisted, that this discontinuance of the office at Danville, and thus taking their land out of market, during the period which intervened the proclamation and the notice, that the land was subject to entry, rendered the renewal of the application for pre-emption necessary to confer that right, and gave to appellee's entry the preference.

We do not perceive how a regulation of the general land office, in the absence of some statute requiring such a renewal, could produce such a result. Individuals rely for the protection of their rights on the law, and not upon regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect. The act providing for pre-emptions does not declare, that when lands are withdrawn from market for a short period, after a claim for a pre-emption has been filed, the application shall be renewed. And the officers of the land-office are powerless to annex conditions or provisions to the law. That can only be done by the law-making power. When, therefore, Baty filed his application under the act of 1841, he had an exclusive right to enter this land by conforming to the provisions of that law, and any other conditions superadded by the commissioner of the general land-office could not affect his rights.

The pre-emption in this case is claimed under the fifteenth section of the act of the 4th of September, 1841, and it declares, that when a person settles and improves a tract of land, subject at the time to private entry, shall file his declaration of intention within thirty days thereafter, and shall, within twelve months after the date of such settlement, make proof and payment as therein required, he may thus become the purchaser; and if such person shall fail to make proof and payment within that time, the land shall be subject to the entry of any other person.

To avail himself of the benefits of the pre-emption laws, a person must comply with the conditions they impose. It is a favor bestowed only on the terms prescribed by the statute.

It appears from the record in this case, that the land-office

at Danville was closed on the 5th of May, 1866, orders having been received to remove the books, papers and other fixtures of the office to Springfield, where land lying in that district should become subject to entry, after proper notice should be given. We also see, that on the 11th day of December, of that year, Baty made the final proof, and was permitted to enter the land. The record fails to disclose what length of time intervened after the closing of the office at Danville, before lands in the Danville district became subject to entry at Springfield, but we may safely infer, that the officers did not compute any portion of the time this land was withdrawn from the market, as a part of the year within which Baty had the right to make his proof and enter the land.

While the law, in terms, fails to indicate the mode in which the time must be computed, it is manifest, that it was the intention to give the pre-emptor an entire year, while the land was subject to entry, within which to make his final proof, and to complete his purchase.

Unless such a construction be placed upon the law, the pre-emptor is liable to lose his labor, improvements and expenditures made upon the land, with not only the permission of the government, but with the assurance that he should have a year within which to pay for and receive a title to the land. If a different construction was to prevail, Baty, in this case, would be limited to perhaps no more than six months to complete his entry, as, after the Danville office closed in May, the land may not have again been placed in market till after the expiration of the year after he filed his declaration of an intention to pre-empt this land. Such, we think, was not the legislative intention, but, on the contrary, that the pre-emptor should have full twelve months while the land could be entered, to make payment and receive his certificate of purchase. The officers did right, then, in excluding the time the land was not subject to entry, as we presume they did, when they permitted Baty to make his entry under the act allowing pre-emptions.

The entry was made, in this case, only some twenty-six days after the year had expired, and we presume the land was out

of market for that or a longer period, or the officers would not have permitted the entry to be made. Such being the case, we think the entry by Baty was legally made.

In the case of *Clements* v. *Warner*, 24 How. 394, the Supreme Court, in a case similarly situated, held such an entry valid. And although this question was not discussed by the court, still the entry by the pre-emptor in that case was made as in this. By the opinion of the court, it appears, that the pre-emption in that case was begun more than one year prior to the time when the entry was made, and in that case, as in this, the land was sold to a different person the next month after the pre-emptor had commenced his settlement. Yet the court held, that the pre-emptor was entitled to hold the land, although he paid his money and received his certificate subsequent to the other entry. It must, therefore, be held, in this case, that Baty's entry related back to his settlement and the filing of his declaration of intention to pre-empt the land. It thus became appropriated and was taken out of the market, and was so when appellee made his entry, and hence it was wholly unauthorized and in no respect affected Baty's right to the land. And his children, by his death, succeeded to all of his rights. They are therefore entitled, on the proof in this case, to the relief sought by the bill, and the decree of the court below must be reversed and the cause remanded.

Decree reversed.

Samuel McClure
v.
Robert Wilson.

1. Contract — *subscription paper — binding force of.* Where several persons signed a subscription paper, whereby each one agreed to pay the sum set opposite his name, for the purpose of procuring substitutes for the relief of the drafted men of a certain township, and such substitutes were furnished by one of the subscribers, by means of money advanced and borrowed by him upon the faith of such subscriptions, — such person so advancing the money may maintain his action against any subscriber who neglects or refuses to pay his subscription.

2. In such case, the party advancing the money, upon the faith of the subscriptions, becomes a proper promisee, or payee.

3. Same — *verbal declaration to subscribe money — binding.* When a person, at a public meeting, held for the purpose of raising money to procure substitutes for the drafted men of the district, verbally declared, that he would give $400 for such purpose, such declaration constitutes a binding promise on his part, to pay such sum to any person who accomplishes the object.

4. Same — *subscription paper — evidence of promise.* A subscription paper is evidence to all who see it, that the persons whose names appear upon it as subscribers, have promised to pay the amounts set opposite their respective names.

Appeal from the Circuit Court of Edgar county; the Hon. James Steele, Judge, presiding.

This was an action of assumpsit brought by the appellant against the appellee, in the Clark County Circuit Court, and taken thence by change of venue to the Edgar County Circuit Court. The facts in the case are fully stated in the opinion.

Mr. John Scholfield, for the appellant.

Mr. James A. Eads, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was an action of assumpsit brought by Samuel McClure, against Robert Wilson, for money paid, laid out and expended, and lent and advanced by the plaintiff to the defendant at his special instance and request. The plea was non-assumpsit, and a trial by the court, by consent, without a jury.

The plaintiff, to maintain the issue on his part, offered in evidence a small blank book belonging to him, having this heading: "We the undersigned agree to give the amount set opposite our respective names, for the purpose of procuring substitutes for the drafted men of Douglas township," below which was the defendant's name, placed there by his direction, for $400. The plaintiff then offered to prove by the depositions of several persons the circumstances under which this subscription was inaugurated. That about the 20th of November, 1864, a meeting of the citizens of Douglas township was held,

for the purpose of raising money, and taking the necessary steps to procure substitutes to relieve that township from the military draft which had just then taken place; that the meeting was regularly organized by the election of a president and secretary; that plaintiff and defendant were both members of this meeting, and participated in it; that, after discussing various plans, the meeting agreed to make up the money necessary to procure substitutes by a subscription; that thereupon the paper, with the heading above copied, was drawn up by the secretary of the meeting, and signed by various parties; that the plaintiff and his son subscribed one substitute, and the defendant directed the secretary to sign his name for $400, declaring, that he would give that sum and more, if necessary to relieve his sons from the draft; that during the deliberations of this meeting it was mentioned and understood, that the money to relieve the township from the draft would have to be raised immediately, and that the subscribers to the list were unable to pay the money down; that it was then inquired "where is the money to come from?" In reply to this question, the plaintiff and one Fitzsimmons said the money could be raised, but must be paid back by the first of February; on defendant asking if the time could not be extended, Fitzsimmons replied the time was long enough; all the persons present seemed anxious that the money should be speedily raised, and Andrew McClure and Robert Brown, were appointed commissioners to go to the provost marshal's office of the district at Olney, to ascertain for what sum substitutes could be had; that the plaintiff took charge of the subscription list, and with it went to William H. Coons, showed it to him, and borrowed of Coons on the faith of it $1,000, with which to procure substitutes, expecting to collect the money to repay it, from the subscription list. Soon after this borrowed money was received by plaintiff, he went to Olney to procure substitutes, and actually put into the army five or six substitutes, in place of the drafted men of this township, for each of which he paid $650, one of these substitutes was for his own son; that by putting in these substitutes the town was relieved from the draft, so far as those drafted had

reported themselves at Olney; that plaintiff made an arrangement with the provost marshal of that district, by which all persons who had been drafted, and had failed to report, should be discharged from liability on the draft on reporting themselves at the provost marshal's office at Olney.

The subscription book had no government stamps upon it.

The defendant objected to all this evidence, which the court sustained, and the plaintiff excepted. The court then found for the defendant, and judgment was entered against him for the costs. To reverse this judgment, this appeal is prosecuted.

The appellant makes these points: That the undertaking of the defendant was valid and binding upon him. That the plaintiff, having advanced the money, became the promisee, and therefore could maintain this action. That the subscription book was competent evidence without a government stamp.

A long and undeviating current of decisions by this court, and by the courts of our sister States, and which were cited by appellant's counsel, has settled the binding force of contracts of this description.

The appellee contends, that, in order to their validity, there must be either a promisee named or in contemplation, as a corporation to be created thereafter, or else there must be a subsequent agreement by which some party is authorized to expend money upon the faith of the subscription, and that it is only upon the last named contingency that there can be any pretense of a claim in this case. He insists, that the cases cited by appellant fall under one of these classes of cases.

The case of *Roberts* v. *March et al.*, 3 Scam. 198, first cited, was a case where it appeared the sums subscribed were to be paid to certain persons named in the subscription paper as trustees for the purpose of building "the church at the Bethel camp ground." It was proved there was no consideration for the undertaking of the defendants other than this signing of the subscription paper; it was also proved, that the church was built, and that the suit was brought for the benefit of the mechanic. This court held, that the erection of the building fixed the liability

of the subscriber to the mechanic who performed the work. The court refer with approbation to the case of *Bryant* v. *Goodnow*, 5 Pick. 228, where it was held, that where one subscribes with others, a sum of money to carry on some common project, lawful in itself, and supposed to be beneficial to the projectors, and money is advanced on the faith of the subscription, an action for money paid, laid out and expended may be maintained, to recover the amount of the subscription.

The next case was *Cross* v. *The Pinckneyville Steam Mill Co.*, 17 Ill. 54, which was an action to recover three installments, of fifteen per cent each, on two shares of stock alleged to have been subscribed by appellant to this company. The subscription paper for this stock was signed by Cross, about one month before any steps had been taken to incorporate the company. This court held the subscribers liable for the calls.

The next case was the *Tonica and Petersburgh R. R. Co.* v. *McNeely, Admr.*, 21 Ill. 71, in which the general doctrine was stated, that, where the objects of a contract are lawful, and it is founded upon a good consideration, and is entered into by parties capable of contracting, it creates a legal obligation which may be enforced according to its terms.

The case of *Prior et al.* v. *Cain*, 25 Ill. 292, was upon a subscription paper signed by the defendant, and others, by which he bound himself to pay twenty dollars for the purpose of building a church in Adams county for the use of the Christian church. With the introduction of this paper the plaintiffs offered to prove, that, at a meeting held in the neighborhood of the plaintiffs and defendant, the plaintiffs were selected to get up this subscription paper and collect the subscriptions, and to act as a building committee in building the church; that they did, on the faith of these subscriptions, go on and build the church, according to the terms of the subscription paper, and did, in so building the church, and upon the faith of those subscriptions, become personally liable in a large sum of money. The court rejected this evidence. The plaintiffs then offered to prove, that, after the subscription paper was signed by the defendant, and before the commence-

ment of the suit, he admitted he had subscribed twenty dollars to build the church, and that he would pay it, but would not give his note for it; and they also offered to prove, that, at the time defendant promised to pay the subscription, he knew that the plaintiff had become personally liable on the faith of these subscriptions for the building of the church.

The court rejected all this evidence, and, on error to this court, it was held a correct principle, that a person making a promise, on the strength of which other persons advance money, or furnish labor or materials, is bound in good faith to fulfill the obligation, the party paying the money or furnishing the labor and materials having a right to rely on such subscription. And held further, that the court should have received the evidence relating to the subscription, and also the defendant's admissions.

The case of *Griswold* v. *Trustees of Peoria University*, 26 Ill. 41, arose on a paper of this description, and the suit was brought on the instrument: "We, the subscribers, agree to pay the sum set opposite our respective names, for the erection of a building, and in defraying the expenses of putting in operation the college of the synod of Illinois, at Peoria, to be paid as the money shall be required to meet the expenditures, as incurred for the purposes aforesaid."

The defendant objected to the introduction of this paper in evidence, on the grounds, among others, that by it the money was not payable to the plaintiff; that there was no payee mentioned in the instrument, and that no consideration appeared for the agreement.

The proof showed, that the subscription was made in anticipation of a charter. A judgment was rendered against the defendant, which, on appeal to this court, was affirmed, this court holding, that, if the corporation incurred liability on the strength of defendant's subscription, as well as that of others, a suit as for money paid, laid out and expended, would lie against them. The plaintiffs had a right to become the payees and sue as such — referring to *Prior* v. *Cain*, *supra*. And the court say, in such case the contemplated company or college, under the synod of Illinois, to be located at Peoria, is a proper

promisee; and the promise of the subscribers is good to them as a third person who, on the faith of it, had incurred expense and liabilities; and he ought, in all justice, to pay it.

As against the authority or application of these cases, appellee cites *County Commissioners of Randolph County* v. *Jones*, Breese, 237 (new edition), and *Mayo* v. *Chenoweth*, id. 200.

In a late case in this court, decided at April Term, 1866, *Thompson* v. *The Board of Supervisors of Mercer Co.* (40 Ill. 379), which was an action on a subscription by Thompson, to pay three thousand dollars if the county seat of Mercer was located at a particular place, the land of which he owned, these cases were reviewed, and it was held the subscription was binding, and the judgment was affirmed.

We see but slight difference between the case now before us, and the cases of *Prior et al.* v. *Cain*, *Robertson* v. *Marsh et al.*, and *Griswold* v. *Peoria University*, above cited. If they were correctly decided, and we do not question it, the same principles must control here.

The plaintiff here offered to prove, that, on the faith of this subscription of the defendant, he had advanced a large sum of money, and become liable for more, to relieve the township from the draft, and that it was relieved. And wherein does it differ from the case of *Robertson* v. *Marsh et al.?* In that case, all the proof of consideration was the signing of the subscription paper, and the fact that the church was built. If the erection of the building fixed the liability of the subscribers to the mechanic who performed the work, why does not the relief to this township, pursuant to the agreement, fix the liability of the defendant to pay what he engaged to pay therefor?

But it is said there was no promissee; nor was there any in Prior's case, in Robertson's case, or in Griswold's case. They who advanced money, did work, or furnished materials, were proper promisees and payees.

It is, however, insisted, as a conclusive objection to a recovery in this case, that the subscription paper was not stamped with a government stamp, as the revenue laws of the United States require.

It will be observed, that the action is not brought on that paper. It is an action for money paid, laid out and expended; and, though the subscription paper may be invalid as an instrument of evidence (about which we express no opinion, as, in our view of this case, it is immaterial), the other evidence, which the plaintiff offered and which was ruled out, that, at the meeting, the defendant declared he would give four hundred dollars and more to get his sons relieved from the draft, is a binding promise upon him to pay that amount to any one who should accomplish this object.

If I have valuable property in imminent danger, and I make proclamation that I will give fifty dollars to save it, and a stranger undertakes the labor and does save it, on what principle of law or justice is it that I should not pay? So, here, the defendant declared he would give four hundred dollars to save his sons from the draft, and put the declaration in writing. The plaintiff incurred the expense and trouble necessary to save his sons, and did save them; why then should he not be paid the amount promised?

But there is another view of this case. Although the subscription paper might be invalid as evidence, still it was capable of being read and understood as well without a stamp as with one; and, if the plaintiff, on the faith of it, advanced his money for the defendant's benefit, he ought to recover it in this action. The subscription was evidence to those who saw it, that the defendant had made this promise.

We see nothing to prevent a recovery by the plaintiff.

The Circuit Court having entertained different views, the judgment of that court must be reversed and the cause remanded that a new trial may be had.

Judgment reversed.

Syllabus.

THE CHICAGO AND ALTON RAILROAD COMPANY
v.
EUGENE FLAGG.

1. RAILROAD COMPANIES — *when common carriers of passengers — by freight trains.* Where a railroad company regularly carries passengers by a freight train, and so holds itself out to the public, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train.

2. SAME — *may make reasonable rules for conducting its business.* Railroad companies have the power to make all reasonable rules for the government of their trains; and, as to certain classes of trains, they may require tickets to be purchased before entering the train.

3. PASSENGERS — *violating rules — penalty for.* A passenger who knowingly disregards the rule requiring tickets to be purchased before taking passage, is upon the same footing with one who refuses to pay fare, and may be expelled at any regular station.

4. SAME — *may take passage without procuring a ticket, when prevented by neglect of company's agents.* When a railroad company requires tickets to be purchased at the station, facilities must be furnished to the public, by keeping open the ticket-office a reasonable time prior to the time fixed for the departure of the train, and a failure to do so gives the right to a person desiring to take passage to enter the train and be carried to his place of destination by payment of the regular fare to the conductor; and, under such circumstances, his expulsion would be unlawful.

5. SAME — *willful neglect by — to comply with rules — not subject to expulsion — except at a regular station.* When a passenger willfully neglects to purchase a ticket, as required, before entering the train, he cannot be expelled at a place other than a regular station.

6. STATION — *definition of — local usage cannot create.* A water tank, even if a "usual stopping place for trains," is not, within the spirit of the law, a regular station. A regular station means the usual stopping place for the discharge of passengers; and a local usage, adopted by persons, of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a regular station for the discharge of passengers.

7. DAMAGES — *under what circumstances may be more than nominal — when no actual damage sustained.* Where a passenger is expelled from a train, and without fault on his part, he may recover more than nominal damages, even though he has suffered no pecuniary loss, or received actual injury to the person by reason of such expulsion.

8. SAME—*what considerations may enter into the question of.* In such case, although the proof shows that the conductor acted in good faith, and without violence or insult, and that no actual damage was sustained, still, the jury, in estimating the damages, may consider not only the annoyance, vexation, delay and risk to which the person was subjected, but also the indignity done to him by the mere fact of expulsion.

9. STATUTE — *construction of.* The phrase "usual stopping place" means, in the statute, a regular station for passengers to get on and off the trains.

10. FORMER DECISIONS. *The Chicago, B. & Q. R. R. Co.* v. *Parks,* 18 Ill 465, and the *Terre Haute, Alton & St. Louis R. R. Co.* v. *Vanatta,* 21 id. 188, considered and affirmed.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

The facts in this case are fully stated in the opinion of the court.

Messrs. WILLIAMS & BURR, for the appellant.

Mr. J. MCNULTA and W. H. HANNA, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action on the case brought by the appellee against the railway company for wrongfully expelling him from one of its trains. Being desirous of traveling a short distance on the road, he entered what is called the caboose car, attached to a freight train, without a ticket. From the conversation which subsequently took place between him and the conductor, as drawn out by the defendant's counsel on the cross-examination of a witness, it appears he was unable to procure a ticket because the ticket office was closed. When his ticket was demanded on the train he offered to pay his fare, and also offered to give the conductor ten dollars to be kept by him until a ticket could be procured at the next station.

The conductor replied that he was forbidden by the rules of the road to receive money for fares, and should he do so he might lose his place. The train stopped at a water tank about a quarter of a mile from a station called Lanndale, and the conductor there required the plaintiff to leave the train. No

resistance was made by him, and no violence or insult offered by the conductor. The jury gave the plaintiff a verdict of one hundred dollars, for which the court rendered judgment.

It appears from the record that, although this was a freight train, yet it regularly carried passengers, and was held out to the public as so doing. The company itself put in evidence a printed notice, with certain regulations in regard to the carriage of passengers on freight trains, and forbidding conductors to carry them unless provided with tickets in advance. It was therefore a common carrier of passengers by this train as well as by its regular passenger trains, and would have no more right to expel a traveler, wantonly and without cause, from one train than from the other.

It is urged, that the company must have the power to make reasonable rules for the government of its trains. Undoubtedly, and if a company deem it advisable to require tickets to be purchased before taking passage on certain classes of trains, its authority to do so must be conceded. If its rules in this respect are knowingly disregarded, a passenger may be required to leave the train at any regular station, but only at such stations, as decided in the *C. B. & Q. R. R.* v. *Parks*, 18 Ill. 465. The willful neglect to comply with the rules in this matter would be like a refusal to pay the fare, and could place the passenger in no worse position. But, when the company requires tickets to be purchased at the station, it must furnish convenient facilities to the public by keeping open the office a reasonable time in advance of the hour fixed by the time-table for the departure of the train. Should it fail to do this, a person desiring to take passage would have the right to enter the train and be carried to his place of destination by payment of the regular fare to the conductor. To permit a company to complain of a violation of its own rules necessitated by the negligence of its own agents, would be absurd. If, then, as is fairly inferable from the evidence, the plaintiff was prevented from buying a ticket by the absence of the ticket agent, he was rightfully on the train, and his expulsion was unlawful.

But even if wrongfully on the train from willful non-compli-

ance with this rule, he was expelled at a place which, under the statute, rendered the expulsion itself illegal. It is urged that a water tank, if an "usual stopping place," is within the letter of the law. It is within the letter, but so obviously without its spirit, that to permit a passenger to be expelled at a water tank, often miles from a station, and remote from highways and habitations, would defeat the object of the law, and be a striking instance of "sticking in the bark." As has been several times said by this court, the statute means the usual stopping places for the discharge of passengers.

It is in proof that passengers, desiring to enter or leave the train at the Lanndale station, often did so at this water tank, as the freight train frequently passed the station itself without stopping, and the tank was only a quarter of a mile distant. It is also in proof, that passengers left at the station when the train stopped there. Whether this tank was the usual place for the discharge of passengers from freight trains, was distinctly left to the jury by the sixth instruction for the defendant, and they found it was not. Their finding was undoubtedly right. A local usage, adopted by persons living in the neighborhood and familiar with the ground, for their own convenience, can not be considered as making any place but a regular station the proper point for the discharge of passengers.

It is also urged, that, as the conductor acted in good faith, and without violence or insult, and there is no proof of actual damage to the plaintiff, the verdict should have been for only nominal damages. The verdict was for one hundred dollars. It was after dark when this affair occurred and the plaintiff was lame and had two bundles that seemed to be heavy. In order to reach the station or village, he had to pass over a covered railway bridge which spanned a stream, and which he had to cross by means of a plank walk or foot-path, about three feet wide, laid down upon the timbers. The only light came from below and from the ends of the bridge. For a stranger laden with bundles, to be compelled to walk through a dark railway bridge at night, on a narrow path, uncertain as to when a train may come, and liable to be crushed if one does

come, is certainly not a desirable experience. The jury had the right to take these things into consideration, and as the plaintiff himself had been guilty of no delinquency and was anxious to pay his fare, and as his legal rights were violated in expelling him from the train, it was proper for the jury also to consider, not only the annoyance, vexation, delay and risk, to which he was subjected, but also the indignity done to him by the mere fact of expulsion. This case is widely different from that of the *Chicago and Alton R. R. Co.* v. *Roberts*, 40 Ill. 503. We cannot say the damages were excessive.

It is urged, that the court erred in refusing the defendant's seventh instruction, which was, in substance, that, even if the plaintiff was wrongfully put off the train, yet if the conductor acted in good faith and without violence, the jury could give only such actual damages as the plaintiff sustained, or, if he sustained none, then only nominal damages. It is unnecessary to add to what we have already said on this subject. In a case of this character, where the plaintiff was without fault, the jury had a right to give more than nominal damages, even though no pecuniary loss or actual injury to the plaintiff's person was proven. The considerations above named may properly enter into the verdict in a reasonable degree. Neither did the court err in modifying the other instructions by adding, that the phrase, "usual stopping place," means in the statute a regular station for passengers to get on and off the train. That is what it does mean. *Chicago B. and Q. R. R.* v. *Parks*, 18 Ill. 465; *Terre Haute, Alton and St. Louis R. R.* v. *Vanatta*, 21 id. 188.

The judgment must be affirmed.

Judgment affirmed.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1867.

DANIEL B. HEARTRUNFT *et al.*, by their next friend, etc.

v.

HAMILTON C. DANIELS and ALLEN C. YUNDT.

1. WITNESS — *interested in event of suit — incompetent.* When a person having trust property in his hands misapplies any portion of it, he is liable to account for such misappropriation, and to that extent is interested in defeating the trust, and such trustee is incompetent as a witness, by whom to show the purposes for which the trust was created.

2. EVIDENCE — *when will be presumed as having been admitted.* Where it was asked to have certain evidence, which was incompetent, excluded, and the court reserved the question until all the evidence was heard, and then rendered a decree dismissing the bill, without formally excluding it, it will be presumed, that such evidence was considered by the court, in rendering the decree, unless it appears in the decree that it was not

APPEAL from the Circuit Court of Du Page county; the Hon. ISAAC G. WILSON, Judge, presiding.

This was a suit in chancery, instituted in the court below by the appellants, Daniel B., Mary E. and Armeda Heartrunft, by their next friend, Levi Heartrunft, against the appellees, Hamilton C. Daniels and Allen C. Yundt, to compel the execution of an alleged trust.

The bill alleges, that the defendant, Yundt, placed in the hands of his co-defendant, Daniels, a certain promissory note, executed by Martin and David Brown, for the sum of $300, to be held in trust for the benefit of appellants. That said Daniels refuses to execute the said trust, and pretends, together with the said Yundt, that the same is not subject to said trust, but belongs wholly to the said Yundt. The only question presented by the record is, whether Daniels, the trustee, has such an interest in the trust fund as to render him incompetent as a witness in these proceedings. The further facts in this case are fully stated in the opinion.

Messrs. HURD, BOOTH & KREAMER, for the appellants.

Messrs. VALLETTE & CODY, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is first insisted, that appellee Daniels was interested in the event of the suit, and was therefore incompetent as a witness. It appears from the evidence that Abraham Heartrunft went to California in June, 1862, and remained there till June, 1864. That he left his wife and his children at Napierville, and in his absence his wife was seduced, and, having had an abortion, was not expected to live but a very short time, and public rumor having charged appellee Yundt with having seduced Mrs. Heartrunft, and of having produced the abortion, in anticipation of her speedy dissolution, Jacob Becker went to Yundt and charged him with being the cause of the trouble and of her sickness. And he swears that Yundt proposed a settlement of the matter, and that he insisted upon having ten thousand dollars put up for the support of the children of Heartrunft, but Yundt refused to give it, but said he was willing to do

what was right. That Yundt then asked appellee Daniels to figure up what it would cost to support the children until they were of age; that Yundt said he had a note on Brown for $3,000; that he would put it in Daniels' hands to hold, as it was not then due.

That Yundt said, that if Mrs. Heartrunft died, witness would pay all expenses, and he would meet him a week from that time and refund them. Yundt placed the note in Daniels' hands. That the note was put into his hands to support the complainants and to secure the payment of the funeral expenses of Mrs. Heartrunft. That Mrs. Heartrunft died about the 1st of May, 1864, which was the next day after the arrangement was made, but Yundt did not pay the expenses.

Appellee Daniels swore, that the note was placed in his hands, to secure the payment of funeral expenses in case Mrs. Heartrunft should die, and that Yundt would return in a week for that purpose. That he had, through Cody, collected the first installment of interest, which Cody had let Yundt have; that it amounted to $180; that subsequently the note was paid and Yundt placed in his hands United States bonds equal in amount to the note and interest, except the interest paid to him by Cody. Appellants moved to exclude this evidence, on the ground that Daniels was interested, but the court reserved the question until all of the evidence was heard, and rendered a decree dismissing the bill, without formally excluding Daniels' evidence from consideration in rendering the decree.

Independent of Daniels' evidence, it is clear, that the note was placed in his hands for the purpose of supporting appellants, and to pay the expenses incurred in the burial of their mother if she should die. Of this there is no question. And inasmuch as Daniels had appropriated a portion of the fund to another and different purpose, he was directly interested to the extent of $180, in defeating a recovery. As the law then stood, he was incompetent to give evidence, and it should not have been taken into consideration in deciding the case. While it was not necessary to exclude it formally, the chancellor should not have regarded it, but should have decided the case precisely

as though he had not testified. And from the decree, we must conclude that it was considered, and not only so, but that it controled the decision. Had all of the trust fund been still in his hands it might perhaps have been different. But being trust property, if he had misapplied any portion of it, he would be liable to account, and having paid a portion of the fund to Yundt, he had an interest to that extent in defeating the trust. Excluding his evidence, it is clear the note was placed in his hands to be held in trust for the children, and it would follow, that he paid the interest to Yundt wrongfully, and was therefore interested and not competent to testify. The decree of the court below must be reversed and the cause remanded.

Decree reversed.

JOHN LEAKE
v.
GRACE BROWN.

1. PRACTICE — *of a plea — when should be stricken from the files.* When a plea is filed, which has nothing to do with the declaration, it should be stricken from the files on motion, or by the court *sua sponte.*

2. RIGHT OF ACTION — *whether joint or several.* Where a deed is executed by several grantors jointly, but their interests in the premises conveyed are several and distinct, any one of them may bring his separate action for his share of the purchase money, if withheld.

3. PAYMENT — *by certificate of deposit — when will not amount to.* L., the payee of a certificate of deposit, which he had previously indorsed, offered it to B. in payment of a debt, which B. declined to receive. Whereupon L. stated that he was good for it, and would pay it, if the payor named in such certificate did not, and thereupon B. took it; and the bank which had issued it suspended within two days thereafter. In an action by B. against L., to recover the original debt,—*held,* that the receipt of such certificate by B. was not as payment, but taken merely as a means of obtaining the money from the bank, upon the faith of A.'s declaration, that he would pay it if the bank did not; and in no manner was it received upon the faith of A.'s indorsement, that having been made before it was offered.

4. That, in such case, it was not necessary for B. to return, or offer to return, the certificate.

5. Nor was it required that it should be cancelled; on the contrary, it should not be, as it is the only evidence L. has of his deposit with the bank, and it cannot be enforced by a third person.

6. That B. did all that the law required of him with regard to the disposition of such certificate, by surrendering the same to the court, to be disposed of as the court might think proper, after having used it in evidence.

7. That by such surrender of it to the court, it virtually put it in the power of the payee, L., who, upon proper motion, could have obtained it.

8. FORMER DECISIONS. *Miller* v. *Lumsden*, 16 Ill. 161; *Smalley* v. *Eddy* 19 id. 207, considered and approved.

9. PAYMENT—*when made with negotiable paper—concerning return of same—rule different from case of spurious money.* In an action, brought upon the original consideration, when negotiable paper has been given in payment, it is not necessary, as in case of counterfeit or spurious money, that it should be returned, as it need not be done; but it must be shown, that such paper is not outstanding, and that the maker is not liable to a second recovery upon it.

10. INSTRUCTIONS—*proper to refuse—when not based on the evidence.* It is proper for the court to refuse an instruction, which has no basis in the evidence.

WRIT OF ERROR to the Circuit Court of Lee county; the Hon. W. W. HEATON, Judge, presiding.

The facts in this case, are fully stated in the opinion.

Mr. EMERY A. STORRS, for the plaintiff in error.

Mr. B. H. TRUESDELL, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of *indebitatus assumpsit*, brought by Grace Brown against John Leake, to the Circuit Court of Lee county, for an interest in certain lands sold and conveyed by the plaintiff to the defendant at his instance and request.

The general issue was pleaded and three special pleas, to which there was a demurrer, which the court sustained. We may remark here, these special pleas should have been stricken from the files on motion, or by the court *sua sponte*, as they had nothing to do with the case made by the declaration.

A trial was had on the general issue, *non assumpsit*, and a verdict for the plaintiff for six hundred and forty-nine dollars and ninety cents in damages.

A motion for a new trial was overruled and judgment entered on the verdict.

To reverse this judgment the record is brought here by writ of error and various errors assigned.

The points made by plaintiff in error are, that, as the deed for the land was made to plaintiff in error by several persons joining therein, there can be no recovery by one of the grantors of his or her aliquot part of the purchase money not paid by the grantee.

The record shows, that the land sold to plaintiff in error was held by several persons with different interests, and the amount in suit was a portion of the money coming to the defendant in error for her interest therein. The interests of the grantors being several, they are entitled to bring separate suits for the portion coming to each one of them if withheld. The money was handed to Brown, the justice of the peace who took the acknowledgment of the deed, on the part of three of the grantors, by the plaintiff in error, as the aggregate sum due for the land, and it was paid over by Brown in the presence of plaintiff in the proportions to which each was entitled. The interest of defendant in error in the land was a separate, distinct legal interest, and she was therefore capable of bringing this action and of maintaining it. 1 Ch. Pl. 2. Among the funds so handed to Brown, and handed by him to the defendant in error as her share of the purchase money, was a certificate of deposit of six hundred dollars in the banking-house of E. B. Stiles, payable to the order of plaintiff in error, and dated October 8, 1864.

On this certificate, thus passed over to the defendant in error, the plaintiff in error makes his second point, which is, that the receipt of this certificate as a part of the purchase money, was *prima facie* payment to that extent, and that it devolved on the defendant in error, the duty of exercising due diligence in endeavoring to secure its payment; that by the receipt of the certificate indorsed by the payee, the relation of the parties become that of an assignee and assignor of commercial paper. Plaintiff in error insists, that it was upon the indorsement the

parties relied, and in order to hold plaintiff in error as such indorser, it was incumbent on defendant in error, to use the diligence required by the statute.

Is it a fact, that the certificate was taken upon the faith of the indorsement? The witness, Brown, says that the certificate was indorsed before he proffered it to the defendant in error, and on some suggestion being made by one of the parties present, that Stiles' bank had stopped payment that day, and defendant in error being unwilling to receive it, the witness said to her, "Well, Leake is perfectly good for it if Stiles is not, as Leake had indorsed it." The defendant in error then observed, "he was good for it whether Stiles was or not, that if Stiles did not pay it, he would."

The indorsement had been previously made, so that, it is clear, the defendant in error did not receive the certificate upon the strength of the indorsement nor rely upon that, but upon the declaration of plaintiff in error, that he was good for it if Stiles was not, and that he would pay it if Stiles did not.

There does not appear to be any evidence, that the certificate was received on the faith of the indorsement, and, therefore, the relation of assignor and assignee, with its concomitants, did not exist.

The third point made by plaintiff in error is, that, in any view of the case, the failure to return, or offer to return, the certificate is fatal to a recovery by the defendant in error.

We accord fully in the doctrine of the case of *Miller* v. *Lumsden et al.*, 16 Ill. 161, to which plaintiff in error refers to sustain this point, but do not think it is hostile to the claim set up. The court held, that it was an established rule of law, where a bill of exchange or a negotiable note is taken for a prior debt, that the party cannot recover upon the original consideration, unless the bill or note is produced and cancelled at the trial, or it appears, that it cannot be enforced by a third party. In that case, the bill was in the hands of a holder for value in an adjoining State, and was outstanding for collection against the maker of the note. If, then, a recovery had been allowed by Miller on this note, Lumsden & Co., being liable to

the holder of the bill, might have been compelled to pay the same debt twice. A party thus situated cannot be subjected to this two-fold liability. It would not suffer the plaintiff to collect the note while the bill of exchange was in the hands of a *bona fide* holder.

The difference between this case and that is so obvious, as to need no particularizing. Here the certificate was not given or accepted in payment of a prior debt; it was not given and received as negotiable paper to be subject to the incidents of such paper; it was produced at the trial and placed in the power of the court to do with it as justice and the law required. It could not be, and should not be, canceled, for it was the evidence the plaintiff in error had of a deposit with Stiles, and it fully appeared it could not be enforced by a third person. The defendant in error, by placing the certificate in the power of the court, after putting it in evidence, did virtually put it in the power of the plaintiff in error, the payee therein, to whom the court, on motion for such purpose, would have caused it to be delivered in the event of a recovery against him. This is all the law required of the defendant in error.

The case of *Smalley* v. *Edey*, 19 Ill. 207, decides, that a negotiable note, executed by a debtor, in settlement of his debt, to a third person, at the instance of the creditor himself, is *prima facie* a payment of the original debt, referring to *Ralston* v. *Wood*, 15 id. 159, and 2 Greenl. Ev. §§ 519, 520.

We are not disposed to dispute this doctrine, and if this case was like that, it would control. But there are several points of difference. This certificate was not taken in payment of a prior debt, nor at the instance of the defendant in error. The facts to which we have adverted, as having occurred at the time of the transaction, forbid the idea of *prima facie* payment by this certificate.

All the circumstances show most clearly and conclusively, that the certificate was not taken as a payment, but merely as a means of obtaining the money supposed to be ready and on hand in the banking house of E. B. Stiles. To "this complexion," and to this only, must this case come.

The other cases cited by plaintiffs' counsel on this point, are undoubtedly good law where the facts are accommodating. In this case, the facts are obstinate, refusing to yield to the pressure of the plaintiff in error, that the certificate was taken on the indorsement and on faith of it.

Plaintiff in error closes his argument by insisting, that there is still an insuperable difficulty in the way of a recovery in this case, from the fact, that no offer was ever made to return the certificate, and likens it to a case of a payment made in the bills of a broken bank, or in counterfeit notes, where the law demands the bills shall be returned in a reasonable time to the person paying them, in order that he may have a speedy opportunity to trace up the party from whom he received them. The cases of *Magee* v. *Carmack*, 13 Ill. 291, and *Simms* v. *Clarke*, 11 id. 141, are cited on this point, and similar cases decided by the courts of New York, New Hampshire and Massachusetts. The doctrine of these cases is correct, and meets our unqualified approbation. We do not think, however, the law of those cases is, or should be, the law of this. They stand on different bases. In the case of counterfeit or spurious money, as this court said in the case of *Magee* v. *Carmack*, the money should be returned in a reasonable time, so that the debtor may avail of his right to recover of the person from whom he received it, and every day's delay jeoparded that right. This is the reason for the decisions in all the cases cited to this point, but such a reason does not apply, and can have no force, with regard to negotiable paper. That is not to be returned upon the maker, or drawer, as the case may be, but it must be shown, the paper is not outstanding, and therefore the maker is not liable to a second recovery upon it.

It is proved in this case, that Brown, the justice of the peace, demanded payment of this certificate from Stiles within a week after it was passed over to defendant in error; and it is also proved, that about two months or more after this transaction, in December, 1864, the plaintiff in error told the counsel for defendant in error, that in a week or two he would call and pay the certificate. This, he did not do.

We are of opinion, from the facts in this case, that this certificate was not received in payment by the defendant in error, and was so understood by all the parties; that it was not taken upon the indorsement being made, as that was made before it was offered; that its receipt had no connection with the indorsement and was not induced thereby; that it was not understood at the time, nor was such the intention, that defendant in error should place herself or had so placed herself in the position of an indorsee of negotiable paper, as to subject her to all the consequences of such a position; that she took the certificate merely as a means of obtaining the money from the banking house supposed to be there ready for her and for no other purpose, and on the faith of plaintiff's promise, that he could pay it, if Stiles did not. We think the liability of the plaintiff in error is conclusively fixed, and if there is to be a loss on this certificate, justice and equity demands, that the plaintiff in error shall incur it.

An exception is taken by plaintiff in error for refusing to give the following instruction on his behalf: If the jury believe, from the evidence, that the defendant, Leake, gave to the grantors in the deed mentioned in the case a certificate of deposit, signed by E. B. Stiles for six hundred dollars, as produced in evidence in this case; and if the jury believe that the grantors in the deed objected to receiving it, in part payment of the purchase money of said real estate described in the deed, because there were rumors at the time of the purchase, that Stiles had closed his place of business, and that thereupon Leake indorsed the certificate, and that it was then received by the grantors in the deed without any further objections on their part; that then Leake's liability is determined and fixed as a guarantor or indorser, and no other, and the plaintiff cannot recover in any action against Leake, unless all the grantors join in an action against him, and unless Stiles was insolvent, or a suit instituted against him would have been unavailing.

If for no other reason, the instruction was properly refused, there being no evidence on which to base it. As we understand the evidence and have commented on it, none of it goes to show

that defendant in error took the certificate *upon* the indorsement by the plaintiff in error.

Perceiving no error in the record the judgment must be affirmed.

Judgment affirmed.

GEORGE FIKES
v.
MARY MANCHESTER, Admx., etc.

1. MORTGAGEE *of chattels — claiming possession must show himself entitled to.* A mortgagee of personal property claiming possession, must show himself entitled to it by the terms of the mortgage, and if that provides for possession remaining with the mortgagor until the happening of a default, the mortgagee must show such default.

2. SAME — *what will be considered prima facie right of possession.* In an action of trover brought against a mortgagee for the conversion of the property, where the note, to secure which the mortgage was given, had matured before suit brought, and the property had passed into the possession of the mortgagee, the production of such mortgage and note uncanceled by the mortgagee, is *prima facie* evidence of his right to the possession.

3. MORTGAGOR — *of attempt by, to impeach the consideration — what facts deemed material — of which he must make proof.* And in such case, where the mortgagor sought to impeach the consideration by showing, that the note was given for a less sum of money, and that it was advanced to the mortgagor to be invested for the mortgagee, — *held*, that the due application of the money was a material fact to be established in order to defeat the *prima facie* right of possession in the mortgagee, and that the burden of making such proof devolved upon the mortgagor.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. R. G. MONTONY, Judge, presiding.

The facts in this case are fully stated in the opinion.

Messrs. PARKS & ARMIS, for the appellant.

Mr. C. J. METZNER, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trover, brought by Mary Manchester, as administratrix of David Manchester, deceased, against George Fikes. The defendant set up a chattel mortgage upon a part of the property, to secure a note of $1,000, bearing date December 15, 1863, and maturing one year from date. As the note had matured long prior to the commencement of the suit, and as the property had passed into the possession of Fikes, in the life-time of Manchester, the production of the note and mortgage made a *prima facie* right to the possession in the defendant. To meet the case thus made, the plaintiff sought to show, that the real consideration of the note was not a debt for $1,000 due to Fikes, but the advancement of certain moneys by Fikes to Manchester, to be invested for the former in Michigan. The court refused to instruct the jury, for the defendant, that, even if this were the true consideration of the note and mortgage, it devolved upon the plaintiff to show the money had been duly invested, but gave an instruction to the plaintiff which tended to convey a different opinion. This was error. It is quite true, as said by appellee's counsel, that, where the morgagee of personal property is claiming possession, he must show himself entitled to it by the terms of the mortgage, and, if that provides for possession remaining with the mortgagor until the happening of a default, the mortgagee must show such default. But all this the defendant in this case did, when he produced the mortgage and the note uncanceled. The plaintiff then seeks to impeach the consideration, by showing that the note was given for a less sum of money, and that this money had been applied according to the directions of the defendant. The due application of the money was a material part of his evidence, in the attempt to defeat the *prima facie* case made for the defendant by his note and mortgage, and the burden of making this proof was clearly upon the plaintiff. Although all the evidence is not preserved in the bill of exceptions, there is enough to enable us to see, that this error, in regard to the instructions, was material. The judgment must be reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

GEORGE R. BABCOCK
v.
JOHN MCFARLAND.

1. CHATTEL MORTGAGE — *right to retain possession under.* Where a chattel mortgage contains a provision, that, if default shall be made in the payment of the debt, or the mortgagor shall attempt to sell the property, or it shall be levied on under process, or distrained for rent, or he shall attempt to remove the same, or the mortgagee shall be in danger of losing his debt, he may enter upon the premises of the mortgagor and take possession of the same and sell it to raise the money to pay the debt; and that the mortgagor should keep the property insured for a sum sufficient to cover the debt, and keep it in good repair except necessary wear and tear, — *held*, that the mortgage authorized the debtor to retain possession till the debt was due.

2. SAME — *erasure before signed.* Where it appeared in evidence that a clause in the printed form of the mortgage was stricken out, which in terms provided that the property might remain with the debtor, before it was executed, this does not change the right, when such appears to have been the intention from the clauses left in the instrument.

APPEAL from the Circuit Court of Knox county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an agreed case, in the Knox Circuit Court, for the purpose of obtaining the opinion and judgment of the Circuit Court upon a chattel mortgage.

A declaration was filed by George R. Babcock against John McFarland averring a trespass by taking certain articles of personal property of the plaintiff which he refused to return on demand. A plea of not guilty was filed.

The parties waived a jury, and the cause was tried by the court, by consent, at the September Term, 1866. It was admitted on the trial that Leander B. Reynolds was the owner of the mortgaged property when the mortgage was executed on the 2d of January, 1865, to Babcock, and that he remained in possession and apparent ownership until about the 1st of December, 1865, at which date Reynolds sold and delivered the property described in the mortgage to George J. Bergen and Frederick P. Sissen, who conveyed it by a deed of trust to O.

F. Price for John McFarland, about the 5th of December, 1865. The mortgage to Babcock was duly recorded on the 22d of January, 1865. Subsequently to making the trust-deed, Bergen and Sissen made an absolute sale of the property to defendant, and he took possession and so remained at the commencement of the suit. That the property was demanded, but not delivered before the suit was brought.

Plaintiff, on the trial, offered to read the chattel mortgage in evidence, but it was excluded, as affording no evidence of ownership or right of possession by plaintiff, the court holding that it contained no provision authorizing the mortgagor to retain possession, and that it was therefore void as to creditors and purchasers. The court found the issues for the defendant, and rendered judgment in his favor for costs. Plaintiff brings the case by appeal to this court, and assigns for error, the rejection of the mortgage as evidence, and the rendition of judgment in favor of defendant.

Messrs. FROST & TUNNECLIFF, for the appellant.

Messrs. LANPHERE & PRICE, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It is claimed, that the mortgage, out of which this controversy has arisen, fails to provide, that the mortgagor should retain possession of the goods and chattels therein described, and was therefore void as to creditors and purchasers. The instrument provided, that, if the money to secure which the mortgage was made should be paid at the times therein specified, then the mortgage should be void.

The mortgage contained this provision:

"Then these presents, and every matter herein contained, shall cease, and be null and void. But, in case default shall be made in payment of the said sum of money above mentioned, or any part thereof, at the time above limited, for the payment of the same, or if the said party of the first part shall sell,

BERNARD E. WALL

assign or dispose of, or attempt to sell, assign or dispose of, the whole or any part of the said goods and chattels, or remove or attempt to remove the whole or any part thereof, from the said county of Knox, without the written assent of the party of the second part, or the same or any part thereof shall be seized by virtue of an execution, attachment or warrant of distress against the property of the said Leander B. Reynolds, or if the said party of the second part shall be in danger of losing, from any cause, the whole or any part of the said sum of money above mentioned, by delaying the collection thereof until the time for the payment of the same, then, and from thenceforth, it shall be and may be lawful for the said party of the second part, his executors, administrators or assigns, or his, her or their, authorized agent, to enter upon the premises of the said party of the first part, or any place or places where the said goods and chattels, or any part thereof, may be, and take possession thereof, and to sell and dispose of the same for the best price or prices, that can be obtained therefor at public vendue," etc., — specifying the manner in which notice of the sale should be given.

At the end of the first sentence of this provision, these words had been printed but afterward erased: "And it is expressly agreed by the parties hereto, that the said party of the first part shall have and retain possession of all the said personal property until the ———, A. D. 186–." The mortgage also contained this stipulation: "'Tis hereby agreed, that the party of the first part shall keep an insurance for the benefit of the party of the second part, on the above described personal property, a sum that is equal to the amount that is due and unpaid, and 'tis further agreed, that the party of the first part is to keep the above machinery in good repair, except necessary wear and tear." These provisions present the question sought to be determined on this record.

The intention of the parties must control, if it sufficiently appears from the language employed in the mortgage. The statute declares, that the parties may provide in the mortgage

itself, that the property may remain in the possession of the mortgagor. It has, however, been repeatedly held by this court, that a mortgage is void as to third persons when the possession remains with the mortgagor, without such a provision in the instrument. If, then, from the language employed in this mortgage, it does not appear that the mortgagor might retain possession, then it was properly rejected when offered in evidence: otherwise it should have been admitted.

In the case of *Letcher* v. *Norton*, 4 Scam. 575, the language of the mortgage was very similar to that employed in this, and the court held, that it provided for the possession to remain with the mortgagor. The court say: "Could any extrinsic evidence be reasonably required to prove that it was the intention of the parties to the mortgage, in which the foregoing language is used, that the title of the property should be separate from its possession? Why should the mortgagor authorize the mortgagee, on default of the payment of the note of the former, to enter upon and seize the mortgaged property, if, at the time of the execution of the mortgage, he (the mortgagee) was intended to and did take possession of it? Such a construction of the mortgage would do violence to its provisions. The mortgage, then, does contain authority to the mortgagor, to retain possession of the property in dispute, until the happening of a certain contingency. To have authorized him expressly, in so many words, to do so, could not have more certainly expressed the intention of the parties that he should do so. If it were susceptible of a doubt, it might be otherwise, but it is not." The language of the mortgage under consideration, is more satisfactory, if possible, than that employed in the case to which reference has just been made.

The mortgage, in this case, has the additional clause, that the mortgagor is to keep the machinery in good repair, except necessary wear and tear. Why such an agreement, unless it was to remain with, and be used by, the mortgagor? Why provide that, in case of default of payment, or the attempt of the mortgagor to sell, assign or dispose of it, or to remove the same from the county, or in case of its seizure on execution,

it should be lawful for the mortgagee to enter upon the premises of the party of the first part and take possession of the property, if it was not intended that the mortgagor should retain possession? How could the mortgagee enter upon the mortgagor's premises and take possession of the property, when it was already in his own hands? We are unable to perceive even a doubt, that it was the intention for the mortgagor to retain possession. It is so clearly expressed, that it would be manifest to all persons by simply inspecting the instrument.

Nor does the fact, that a portion of the printed form was erased, matter. Enough is left to clearly declare the intention. If it had been otherwise, the scrivener would, no doubt, have erased the whole provision and left it so that the intention would not have appeared in the deed. We are not authorized to conclude, that the parties did not intend the possession to remain with the mortgagor, simply from the fact that the sentence was stricken out. It may have been considered useless by the scrivener, while others, perhaps, would have preferred to express the intention by permitting it to remain. But the intention still appears, notwithstanding it was erased.

The court erred in refusing to permit appellant to read the mortgage in evidence, on the trial of the cause in the court below. And for this error the judgment is reversed and the cause remanded.

Judgment reversed.

ALBERT W. RUDD

v.

THOMAS WILLIAMS.

1. PLEADING — *of the declaration — allegations and proofs must correspond.* Where a plaintiff, by his declaration, claimed a prescriptive right to the use of the water of a certain stream for his mills, and the testimony failed to sustain such claim, — *held*, that he was bound to establish his case, as stated in the declaration, and his failure to do so was fatal to a recovery.

2. PRESCRIPTION — *a right by — what will not be considered.* In such case, where it appears by the proof, that both parties had the right to erect a dam and mill on the stream in question, and the plaintiff's cause of action consisted wholly in the alleged fact that the defendant's dam flows the water back on the plaintiff's mill-wheel, a prescriptive right is not established, and an action for such injury cannot be based upon such right.

3. SAME — *concerning the obligations of parties to each other.* And, under such circumstances, it is the bounden duty of each of the proprietors so to use the water of the stream, as not to injure the other in the use and enjoyment of his property.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. J. C. BEATTIE, for the plaintiff in error.

Messrs. PAYSON & PERRY and FLEMING, PILLSBURY & PLUMB, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, brought in the Livingston Circuit Court by Thomas Williams against Albert W. Rudd, claiming damages for obstructing the free course and use of the water of the Vermilion river, to and from the saw and grist-mill, and wheels for the use of the same, and which plaintiff has had for thirty years, until obstructed by the defendant. In the second count it is alleged, that plaintiff, and those under whom he claims, were possessed of this right to the use of this water, and of the mill and premises, "time, whereof the memory of man runneth not to the contrary."

The obstruction complained of, appears to have been by repairing, by defendant, of an old dam, three miles below plaintiff's dam, and increasing its height some eighteen inches, by which the water was backed up on to the wheel of plaintiff's mill.

Much testimony was heard, and the whole subject of complaint was thoroughly examined The jury found for the plaintiff,

and assessed the damages at three hundred and thirty-five dollars.

The court overruled a motion for a new trial, and rendered judgment on the verdict, to reverse which, this writ of error is prosecuted.

It will be perceived, the plaintiff below, claimed in both counts of his declaration, a prescriptive right to the use of this water for his saw and grist-mill. There is no proof in the record sustaining this claim; on the contrary, it is shown by all the testimony, that his grist-mill was erected, flumes made for it, and its wheels put in, within the last ten years.

Inasmuch, then, as the plaintiff claimed a prescriptive right, and based his action thereon, he was bound to prove it by legitimate evidence. He was bound to make out his case as he had stated it, failing in which, the verdict should have been for the defendant, and the court should so have instructed the jury.

From the evidence, it clearly appears the plaintiff's cause of action consists wholly in the alleged fact, that defendant's dam flows the water back on to plaintiff's wheel, and to maintain such an action, resort need not be had to prescription.

It is one of the hoary and time honored maxims of the common law, that every man must so use his own property as not to injure another in the use and enjoyment of his property.

From all that appears in this case, both parties had the right to erect a dam and mill on the stream in question, and the plaintiff, who gained no exclusive right by his prior occupancy of his site to the use of the water as it flowed in its natural channel, is bound so to use it as not to injure the servient proprietor lower down the stream, while, at the same time, such proprietor is bound so to construct his dam and works, that the water stopped by them shall not flow back on to the plaintiff's works, or otherwise do him an injury.

This was not the claim of plaintiff as set out in his declaration, and he did not establish his claim as he alleged it. Consequently, a new trial should have been granted, on the principle, that the allegations and proofs must agree.

We refrain from going into an examination of the various questions raised upon the instructions, it being wholly unnecessary, from the view we have felt bound to take of the case, as it is presented by the evidence in the record.

The judgment must be reversed and the cause remanded, with leave to plaintiff below to amend his declaration.

Judgment reversed.

J. ARTHUR WALTERS
v.
HENRY M. WITHERELL.

1. WITNESS — *indorser — not competent witness — to impeach note assigned by him.* An indorser is not a competent witness to impeach the validity of a note which he has assigned.

2. FORMER DECISIONS. The cases of *Walters* v. *Smith,* 23 Ill. 345; *Rives* v. *Marrs,* 25 id. 316; *Curtis* v. *Marrs,* 16 id. 509; *Webster* v. *Vickers,* 2 Scam. 295, and *Bradley* v. *Morris,* 3 id. 183, explained.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of assumpsit, brought by the appellee against the appellant, in the Recorder's Court of the city of Chicago, and subsequently transferred to the Circuit Court of Cook county, upon six promissory notes, amounting in the aggregate to $553.30, and which notes were made and executed by the appellant, who delivered the same to one Henry McKenzie, by whom they were indorsed, and assigned to the appellee. There were two trials had of the cause by a jury, and upon the second trial, a verdict was found for the plaintiff of $584.27, upon which judgment was rendered, and the case is now brought to this court by appeal.

The single question is presented by the record, as to whether the indorser of a note is a competent witness to impeach its validity, after it has been assigned by him.

Mr. M. A. RORKE, for the appellant.

Messrs. HAINES, STORY & KING, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the trial of this case in the Circuit Court, the payee and indorser of the notes on which the suit was brought was offered as a witness to prove the notes were assigned after maturity, and that the consideration had partially failed. The court held the witness incompetent, and this ruling is assigned for error.

Whether the indorser of negotiable paper, having given it the sanction of his name, shall be permitted to impeach its consideration by his own testimony, is a question upon either side of which a large array of authorities can be cited. The point first arose in the well known case of *Watton* v. *Shelley*, 1 T. R. 296, in which Lord MANSFIELD and the other learned judges held the indorser incompetent, on the ground, that it was "of consequence to mankind, that no person should hang out false colors to deceive them by first affixing his signature to a paper, and then afterward giving testimony to invalidate it." This case was overruled by Lord KENYON and the other judges in the equally well known case of *Jordain* v. *Lashbrook*, 7 T. R. 599, and the doctrine of the latter case has since been adhered to in the English courts. In this country there has been a great contrariety of decisions in the different States. The cases are cited by Greenleaf in his Evidence, in the note to section 385. In some States the indorser has been held incompetent in all cases to prove a defense existing against the note at the date of the assignment, while in other States the rule of exclusion has been confined to cases where the note was negotiated before maturity, and in still other States the doctrine of incompetency has been rejected altogether, and the rule of *Jordain* v. *Lashbrook* followed. The distinction sometimes sought to be taken between cases where the indorsement was made before and those in which it was made after maturity, seems to us without foundation, and inconsistent with the

reason of the rule. The indorser lends the sanction of his name and faith as much by an indorsement after as before maturity. It is true, the assignee in the former case, takes the note subject to many defenses, which could not be made to a note indorsed before maturity; but the indorser, who sells a note past due without informing the purchaser of a defense to which it is liable, is as much guilty of "hanging out false colors" as if the note were not due.

There being this contrariety of decisions, the counsel for appellant urges us to consider this question as one not yet decided by this court. He insisted, that it has not yet received in this tribunal such fullness of consideration as to firmly settle the rule for this State. In this, however, we cannot agree with him. In *Walters* v. *Smith*, 23 Ill. 345, this question came before this court in a case in principle precisely like the one before us, and it was held the indorser was incompetent. It is true, the court do not in the opinion review the authorities, but it is not therefore to be supposed the case was inconsiderately decided. The same doctrine is recognized by the court in *Rives* v. *Marrs*, 25 Ill. 316, and in *Curtis* v. *Marrs*, 29 id. 509. It is urged, that a different rule is laid down in *Webster* v. *Vickers*, 2 Scam. 295, and in *Bradley* v. *Morris*, 3 id. 183. We do not thus construe those cases. In the first, the assignor was the mere agent of the plaintiff in taking the note, and having taken it in his own name, he assigned it to his principal, as the rightful owner. He did not sell the note or deceive the plaintiff by giving it the sanction of his name. In the other case, the court seems rather to recognize the general rule of exclusion, but say, that as the witness had indorsed without recourse, his testimony could not be objected to on the ground of policy. This question having been thus definitely ruled in the recent case in 23 Ill. and acknowledged in the later cases, I agree with my brethren in considering the rule as settled in this State, though my own judgment would incline to the doctrine of *Jordain* v. *Lashbrook*.

Judgment affirmed.

Syllabus.

ISAAC COOK
v.
JEHIEL F. NORTON *et al.*

1. CLAIM AND COLOR OF TITLE — *what constitutes.* Claim and color of title exists where the deed, upon its face, purports to convey the fee, and the grantee goes into possession under it, and accepts and holds it in his own right, and as an owner of the fee.

2. STATUTES — *recording laws not regarded — party having color of title — limitation will run in favor of — notwithstanding notice of adverse claim.* Under the act of 1839, the recording laws will not be regarded. Limitation laws do not proceed upon the theory of the absence of notice of an adverse claim to the premises, and hence, the limitation will run in favor of a party having claim and color of title, although he may have actual notice of an adverse claim by record, or otherwise.

3. TAX RECEIPT — *when fatally defective — as showing payment of taxes.* A tax receipt which simply shows, that "dollars" were received, and fails to state that, whatever amount was received, was in full of the taxes assessed, and there is no character opposite the figures to indicate what they are designed to represent, is fatally defective.

4. STATUTES — *seven years limitation act.* Where a party desires to avail himself of the seven years limitation act, he must show payment of all taxes legally assessed upon the premises, for the period of seven successive years, with claim and color of title.

5. TAX RECEIPT — *when will be considered sufficient — as showing payment of taxes.* A tax receipt, exhibited by a party claiming under the seven years limitation act, which simply names the year for which the taxes were paid, without giving the day or month when it was given, is sufficient as showing the payment of the taxes assessed for that year, it being one of the seven years relied upon to complete the bar of the statute.

6. And where such receipt showed assessments upon several tracts of land, the amount assessed to each being carried out into a common column, and the character denoting "dollars," is prefixed to the first amount stated in the column, it must be understood as intended to be repeated as to each amount; and, although such receipt fails to give the sum paid, but simply states that "dollars" were received in full for the taxes of that year, it is sufficient as evidence showing payment, the "dollar" mark being prefixed to the sum stated at the foot of the column showing the gross sum assessed upon all of the tracts, and such sum being equal to the sum obtained by adding together the figures given in the column headed "total."

7. STATUTES — *limitation act of* 1835 — *what necessary to bar the right of entry.* Section eleven of the limitation act of 1835, requires that posses-

sion shall be held by actual residence on the premises, having a connected title in law or equity, deducible of record from the United States, or this State, or the officers therein enumerated.

8. And this section cannot be invoked in aid of a party, who, although he may have a connected title in law, deducible of record from this State, is unable to show actual residence on the premises for the period of seven successive years, by his ancestor or himself.

APPEAL from the Superior Court of Chicago.

The facts in this case are sufficiently stated in the opinion.

Mr. W. T. BURGESS, for the appellant.

Messrs. ARRINGTON & DENT, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by Isaac Cook, in the Superior Court of Chicago, against Jehiel F. Norton, Emily M. Norton, his wife, Grace J. Clarke and Julia Wilkie, to recover a portion of two lots in the city of Chicago. Two declarations were filed, each against a portion of the defendants, and by consent of the parties, the causes were afterward consolidated. It appears that James Ryan was the purchaser from the State, of the premises. His patent bore date the 15th of September, 1845. He had previously, on the 20th of May, of that year, sold to appellant one-third of the premises, for which he had received the pay. He, at the time, executed a contract for a conveyance, when he should receive a patent. It was recorded on the 23d of May, 1845, and Ryan conveyed to Cook on the 10th of October, 1845, by a deed of that date.

But on the 14th of August, 1845, one Ballingall recovered a judgment against Ryan, in the County Court of Cook county, which became a lien on Ryan's two-thirds of the premises. On the 21st of October following, he caused an execution to be issued, and had it levied on Ryan's interest in the lot. On the 19th of November, 1845, Ryan paid $100, which was indorsed as a credit on the execution. On the 8th day of April, 1846,

all the right, title and interest of Ryan in the lot was sold under the execution, to Ballingall, and on the 13th of the same month, a certificate of the sale was filed in the recorder's office.

On the 30th of July, 1846, Cook conveys to one Smith his one-third of the lot, and on the 3d of October following, Ryan conveyed to Wadsworth, Dyer & Chapin, his two-thirds, and they, on the 24th of the next November, conveyed to Smith their two-thirds acquired from Ryan, and Smith thereby became the owner of the whole lot, subject to Ballingall's sale of Ryan's interest of two-thirds of the lot, the time for redemption not having then expired. On the 15th of December, 1846, Smith contracted to sell the lot to Lewis W. Clark, and on the 3d of the following April, conveyed it to him by deed. Clark died in March, 1855, leaving his widow, Emily M., since married to defendant Norton, and an infant child, Grace J. Clark, who had arrived at age when the suit was brought.

On the 29th of September, 1854, Ballingall sold by quit-claim deed, his interest in the premises, the premises not having been redeemed. Cook, in July, 1860, applied to the Superior Court, into which the County Court had merged, by petition for a deed from the sheriff on Ballingall's purchase, which was ordered, and afterward made by the sheriff to Cook; it was executed on the 24th of July, 1860, under which he claims title, and seeks to recover two-thirds of the lot.

It is claimed, that Clark entered into possession of the lot, and paid taxes for seven successive years, from 1847 to 1853, inclusive, under claim and color of title made in good faith. A number of tax receipts were read in evidence on the trial in the court below. After hearing the evidence, the court found the issues for defendants, a jury having been waived, and rendered judgment against plaintiff, from which he prosecutes this appeal.

According to the uniform decisions of this court, the deed from Smith to Clark was claim and color of title. It, on its face, purported to convey the fee, and Clark went into possession under it, and accepted and held it in his own right, and as an owner of the fee. This court has also uniformly held, that

under the act of 1839, the recording laws will not be regarded; that limitation laws do not proceed upon the theory of the absence of notice of an adverse claim to the premises. The act itself makes no reference to notice of an adverse claim. So, being within the provisions of the limitation laws, a party need not show, that he acquired title or occupied the premises without notice that they were claimed by another. And having brought himself within the provisions of the act, the bar of the statute will not be destroyed, by proving that he had either actual or constructive notice of an adverse claim. To give the statute such a construction, would be to hold, that the statute could never run against the better title of record, where there was actual notice, or notice of such facts as should put a purchaser upon inquiry. We are aware of no decision, and it is believed that none exists, which holds, that notice of an adverse claim will prevent the running of the statute, or will defeat its bar, when in other respects, the party has brought himself within its provisions. This, then, is claim and color of title, and Clark's heirs could rely upon it as such in this action, as they succeeded in this respect to all of the rights of their ancestor.

The question, then, presents itself, whether appellees have shown possession and payment of taxes, for seven years successively under their color of title. It appears, that Clark had the lot inclosed and buildings erected on the premises, as early as in the autumn of 1847, and, while the evidence is not altogether satisfactory, it might probably be inferred, that he continued in possession until the time of his death. The evidence is not definite as to whom the tenant held under, who was in possession when the buildings were erected and the lot inclosed, in the fall of 1847. Norton speaks of his living there with his family, but does not say that he was Clark's tenant. He also says, that Clark had possession of the lot until his death, but fails to state when the possession commenced. He also states, that Clark had tenants on the lot, but when, and how long, does not appear. But, even if it could not be inferred that he had the actual continuous possession of the lot for seven

successive years, still, as the case will have to be remanded, the proof, as to possession, can be supplied on another trial.

Appellees have failed to prove seven years' payment of taxes continuously, under the color and possession, if it existed. The first receipt in the series bears date December 3, 1847, and is for the taxes of that year. It is, however, fatally defective in not stating any sum of money received. An inspection of the original receipt, fails to disclose the amount of taxes paid. It simply says, that "dollars" were received for the city and school taxes, assessed by the city in the year 1847. It does not state, that whatever amount was received was in full of such taxes. Nor do we find any character opposite the figures, to indicate what they are designed to represent. The receipt for the county, State and road tax, is not subject to this objection, as it specifies the sum paid, and states, that it is in full for those taxes. But the statute requires the party desiring to avail himself of the bar of the statute, to pay all taxes legally assessed on the property for the period of seven successive years. Now, we see that the city and school taxes, levied for the year 1847, were not paid, or if so, the proof is not contained in this record. Then the taxes for that year were not all paid, and, hence, the payment of taxes did not concur with color of title and possession, when the receipt was given. We then have to look to some future payment, to ascertain when the statute began to run.

The receipt for the State, county and road taxes, levied for 1847, bears date on the first day of July, 1848. This was, therefore, the time when all the requirements of the statute fully concurred for the first time, and hence the statute then began to run. Taking that, then, for the starting point for the payment of taxes, was there seven years successive payment of all taxes proved? In February and June of 1854, Clark paid the taxes of 1853, but the lot was sold for the taxes of 1854, leaving the payment of but six successive years' tax, when the statute requires seven. This does not present a bar to the recovery.

As the case will be remanded, it may be that we should consider the sufficiency of the receipt for the State, county and

town tax, assessed for the year 1850. It does not state on what day or month it was given, but it appears to have been in 1851; from this it seems that the taxes were paid within the limits of seven years, relied upon by appellees, and this is sufficient. It, however, fails to give the sum paid. It has a blank where the sum was intended to have been written, followed by the word "dollars," and a blank for the cents. It was a printed blank, and the treasurer, through his neglect, no doubt, failed to fill in the sum to which the taxes on the several tracts amounted in the aggregate.

It, however, states that "dollars" were received in full, for State, county and town taxes, levied for the year 1850. The right hand column in which the total tax against each tract of land was assessed, has the usual character denoting "dollars," placed at the left side of the top figures, and the two right hand figures are separated from those on the left by a perpendicular line, thus designating the number of cents. This lot is the second in the receipt, and while the dollar character is not placed before the amount, we must understand that it was intended to be repeated. Again, the dollar mark is prefixed to the gross sum at the bottom of this column, thus showing the number of dollars which was assessed upon all the lots embraced in the receipt; and when the figures in the column headed "total" are added together, we see that it makes the gross sum in dollars and cents, placed at the foot of the column. It thereby appears, that the figures extended opposite to each lot, represent the amount of taxes chargeable against it for the year specified. We are of the opinion that this receipt was properly admitted in evidence.

Nor do the facts contained in this record show, that the entry is tolled by the eleventh section of the chapter entitled "Limitations." That section requires that possession shall be held by actual residence on the premises, having a connected title in law or equity deducible of record, from the United States or this State, or from the officers therein enumerated. Although appellees may have shown a connected title in law, deducible of record from this State, still there is not evidence of actual

residence, for the period of seven successive years, by their ancestor or themselves. This section cannot, on the proof in this record, be invoked as a bar to appellant's action. For the errors above indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

GEORGE STINSON *et al.*
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

1. FORMER DECISIONS. The case of *Welsh* v. *People*, 17 Ill. 339, must be considered as decisive of this case.

2. LARCENY — *voluntary parting with title and possession — a fraud not a felony.* If the owner of goods alleged to have been stolen, voluntarily parts with the possession and title, then, neither the taking nor conversion is felonious. It amounts simply to a fraud.

3. SAME — *what constitutes a felonious appropriation.* But, if he parts with the possession only, expecting the identical thing will be returned, or that it shall be disposed of on his account, or in a particular way as directed or agreed upon for his benefit, then the title to the goods does not pass, and they may be feloniously converted, and the bailee be guilty of a larceny, if obtained with that intent.

4. A, B, C and D, were passengers on a railroad train from Detroit to Chicago. D being a stranger to the others, and while the train was in the State of Indiana, A wagered a certain sum with D, and, thereupon, D deposited the amount of his wager in money with B, who was selected as stakeholder, and A deposited an express package purporting to contain an equal amount, but which was afterward discovered to contain nothing but waste paper, whereupon D demanded his money from B, which he refused to pay back. Subsequently A, B and C were arrested in Chicago, upon a charge of larceny, and the money found in the possession of B. *Held*, that the act was a felony. That the conduct of B fully rebutted the idea, that he acted as a mere innocent stakeholder, but, on the contrary, showed collusion with his confederates in the felonious design to deprive D of his money.

5. SAME — *where the original taking is felonious — when thief may be indicted wherever found.* The principle is well settled, that where the original taking is felonious, every act of possession continued under it by the thief is a felonious taking, wherever the thief may be, and to whatever places he carries the stolen property, and he may be there punished for the felony.

6. INSTRUCTIONS — *what questions to be considered by the jury.* In such case, it was not error for the court to refuse an instruction, that unless the jury believed that the defendants were previously acquainted, and connived together for the purpose of obtaining the money and sharing it between them, they must acquit the defendants. The simple question for the jury is, were the defendants then confederating for the purpose of feloniously obtaining the money, and in what manner was it obtained?

WRIT OF ERROR to the Recorder's Court of the city of Chicago; the Hon. EVERT VAN BUREN, Judge, presiding.

This was an indictment for larceny, found against the defendants, George Stinson, Thomas Perkins and W. H. Farmer, in the Recorder's Court of the city of Chicago. A trial was had at the January Term, 1867, and the defendants found guilty, and each sentenced to six years' imprisonment in the penitentiary at hard labor. To reverse which judgment, the case is brought to this court. The further facts in the case necessary to its understanding, are stated in the opinion.

Mr. W. H. H. RUSSELL, for the plaintiffs in error.

Mr. R. G. INGERSOLL, Attorney-General, for the people.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This case must be governed by the case of *Welsh* v. *The People*, 17 Ill. 339. The alleged larceny in that case, was perpetrated by obtaining possession of the goods by the voluntary act of the owners, under the influence of false pretenses and fraud. The same is this case, and the rule there laid down is: if the owner of the goods, alleged to have been stolen, parts with both the possession and the title to the goods, to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way as directed or agreed upon for his benefit, then the goods may be

feloniously converted by the bailee, so as to relate back, and make the taking and conversion a larceny, if the goods were obtained with that intent.

The title to the money put into the hands of Perkins by the prosecutor, did not pass to the stakeholder, or to his confederate, Stinson, with whom the pretended bet was made, for the reason given in Welsh's case. The money of the prosecutor was to be disposed of in a particular way on his account and for his benefit, by staking it against an equal amount of money, alleged to be in the express package, which proved to be nothing more valuable than waste brown paper, though marked on the back and made visible to all, $380.60, thereby implying, that money to that amount was in the package.

Counsel for plaintiffs in error make the point, that, as Seimonds, the prosecuting witness, voluntarily consented and entered into an act for the purpose of gain, and the defendant, Perkins, accepting the money from Seimonds, only as a wager, there could have been no felonious intent on the part of Perkins, he being a mere stakeholder selected by both parties, and unless there was a felonious *intent* on the part of Perkins, there was no larceny.

Here, then, is a distinct admission by plaintiffs in error, if such intent existed, the act was larceny.

We think the intent is very apparent. The evidence shows, as clearly as it can ever be made to show, in a prosecution for stealing by such and kindred contrivances, that the plaintiffs in error were in full fellowship, though traveling, apparently, as strangers, which is an important part in this game, and was very adroitly played by them. To deceive others it was necessary they should appear to be strangers. The fact that Perkins refused to give up the money to the prosecutor, on his discovery that it had been staked against mere waste paper, and his possession of the money in Chicago, where the parties were arrested, fully rebut the idea of his being a mere innocent stakeholder, and establishes the fact, that he was "art and part" with his confederate, in the felonious design. Had he been an innocent stakeholder, and not a confederate, he would have returned to

the prosecutor his money, on discovering he had in his hands only waste paper. This revealed the intent, and made the act a felony. There was no wager in good faith, which Perkins well knew. The whole affair was a device by which the prosecutor should be deprived of his money, and, under the authority of Welsh's case, was a larceny, and should be punished as such.

There is no error in the instructions, as they required the jury to find the whole transaction was concocted in fraud, in order to get possession of the money, before they could convict. They are substantially, in principle, the same as given in Welsh's case, and sustained by this court.

Counsel for plaintiffs in error make this point, that the Recorder's Court of Cook county had no jurisdiction of the offense, the original felonious taking, if such, having occurred in the State of Indiana.

It is answered to this by the attorney general, and correctly, that the principle is well established, where the original taking is felonious, every act of possession continued under it by the thief, is a felonious taking wherever the thief may be; and to whatever place he carries the stolen property, he may be there indicted, convicted and punished for the felony.

This money continued to be the property of the prosecutor. When taken at Lake station, in Indiana, and brought into Chicago, it was still his property, and not only that, but the possession, in legal contemplation, continued in him, and every moment's continuance of the trespass was as much a wrong as the first taking, and may as well come under the allegation "took;" therefore it follows, that these plaintiffs did take, wherever they had the goods. The authorities on this point are conclusive. 1 Hawkin's P. C. 151, § 52; *The People* v. *Burke*, 11 Wend. 129. In this case the goods had been stolen in Canada, and independent of the statute of New York, the court held, that by the common law the offender could be punished in any county where he carries the stolen goods, as he is guilty of stealing them in every place where he has them.

Here the money was brought immediately to Chicago, and found on the person of Perkins, when he was arrested, and the

collusion or confederacy between him and the other plaintiffs was shown. Plaintiffs in error complain, that an instruction they asked of the court was refused. That instruction is as follows: "Unless the jury believe from the evidence, beyond a reasonable doubt, that the defendants were previously acquainted, and that they connived together for the purpose of defrauding the plaintiff out of his money, and with the purpose of dividing, sharing and enjoying it together, that they must acquit the defendants."

This instruction was properly refused. It was wholly immaterial whether the defendants had been previously acquainted, if they were then confederating for the purpose of feloniously obtaining the property of the prosecutor. So, also, it was immaterial whether they designed to procure the money for the purpose of sharing it, or merely for the benefit of one of their number. The true question for the jury was, the manner in which they obtained the money, not the use, as between themselves, which they intended to make of it.

Perceiving no error in the record to the prejudice of the prisoners, the judgment is affirmed.

Judgment affirmed.

LOUISA TODEMIER *et al.*

v.

HENRY ASPINWALL *et al.*

1. HIGHWAYS — *what sufficient description of road ordered to be laid out.* The description of a road proposed to be laid out is sufficiently certain, where from the whole proceedings had thereon, taken together, there appears no difficulty in locating the same.

2. SAME — *of assessment of damages for laying out road.* Where a road was ordered to be laid out, through lands belonging to an estate, an assessment of the damage to the heirs of such estate, is proper and legal.

3. SAME — *separate damages to widow — cannot be assessed.* In such case, separate damages cannot be assessed to the widow on account of an unassigned dower interest. An adjustment of the equities between the fee and the contingent right of dower must be left to the widow and the heirs.

4. PUBLIC OFFICERS — *will be presumed to have performed their duties, unless the contrary appears.* In support of a bill for an injunction against public officers, this court will presume that they have performed their duties as required by law, where the record discloses no proof to the contrary.

APPEAL from the Circuit Court of Stephenson county; the Hon. BENJAMIN R. SHELDON, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. TURNER & SCROGGS, for the appellants.

Messrs. BAILEY & BRAWLEY, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery brought by the appellants against the appellees, to enjoin them, as commissioners of highways of the town of Florence, from opening a highway through the land of the complainants. On the hearing in the Circuit Court the bill was dismissed.

The first objection taken to the proceeding is, the alleged insufficiency of the description of the road in the report of the county surveyor, and in the order of the commissioners. The description as first given in the surveyor's report was wholly uncertain, but he added to his plat a marginal note correcting the description, and rendering it sufficiently certain. So too of the order of the commissioners; while in one part the description is uncertain, yet in another part, in which they refer to the petition for the road, and state that it is granted, they give the description with complete certainty. On the whole order together there could be no difficulty in locating the road.

It is also objected, that the action of the commissioners in assessing damages was illegal, inasmuch as no separate damages were assessed to the widow for her dower interest. The land in controversy taken for the road, belonged to the estate of Frederick Kohlermeier, deceased. By his will he devised his estate to his widow, to hold so long as she remained unmarried, but provided, that in the event of her marriage, she should take only such interest as she would have had if he had died

intestate, and his estate should go to his children. The widow married before this controversy arose, and hence her interest in the estate was an unassigned right of dower. The commissioners assessed twenty dollars to the heirs of Kohlermeier as damages, and we do not think their failure to assess separate damages to the widow was an error in their proceedings. We do not perceive on what basis such damages could have been assessed. Her dower, when assigned, may be allotted in a part of the farm entirely unaffected by this road, or if assigned in such mode as to be injured by the road, the fact that the heirs have received damages may be taken into account in making the assignment. The damages were clearly intended by the commissioners as a compensation to the owners of the land. The heirs are described in their report as unknown heirs. They could not undertake to adjust the equities between the fee and the contingent right of dower. They did all they could do by assessing the damages for the land, leaving the equities between the widow and heirs to be adjusted between themselves.

It is objected, that the damages were never reported to the town auditors, and that no provision was made for their payment. But there is no proof in the record on this point, and we can not presume, in support of a bill for an injunction against public officers, that they failed to perform the duties required of them by law. Some proof should have been made. The decree must be affirmed.

Decree affirmed.

LESTER UNDERWOOD
v.
GEORGE H. WEST.

FRAUD — *when equity will relieve against, by rescinding the contract.* Where A and B agreed to exchange real estate, and A so conducted himself as to induce B to believe, that he was acquiring the title to the whole number of lots contained in a certain inclosure, with the exception of one only, and A, after he had received B's deed for the lands proposed to be exchanged by

him, refused to convey the whole number of lots so pointed out by B, and contained within the inclosure, but tendered a deed for part of the property, leaving out two of the lots,—*held*, that in so acting, A perpetrated a fraud upon B, which a court of equity will relieve against by rescinding the contract.

APPEAL from the Circuit Court of La Salle county; the Hon. SIDNEY W. HARRIS, Judge, presiding.

This was a bill filed in chancery, by the appellant, in the county of De Kalb, against the appellee, to set aside a conveyance of certain lands in De Kalb county, which had been made by appellant to appellee, under and by virtue of an agreement made between them to exchange property. By agreement, a change of venue was taken to the Circuit Court for La Salle county, where, on the hearing of the case, the court entered a decree dismissing the bill, whereupon the complainant appealed to this court. The further facts in the case are fully stated in the opinion of the court.

Mr. D. P. JONES, for the appellant.

Mr. J. O. GLOVER, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It appears from the record, that appellant and appellee, in 1859, agreed to exchange real estate. Appellee claimed to be the owner of an undivided half of the property known as the Fox river house, in the city of Ottawa, which he agreed to convey to appellant, for which the latter was to convey to the former eighty acres of land in De Kalb county and pay him some cattle, as the difference in the value of the property. Appellant executed a deed for the land, and placed it in the hands of Arthur Lockwood, to be delivered to appellee when he should deliver to him a conveyance of the city property. Afterward appellee executed a deed, conveying the undivided half of seven lots in block sixteen, which he delivered to Lockwood, who thereupon delivered appellant's deed for the land.

Afterward, upon learning the contents of the deed, appellant insisted, that two lots had been omitted, and refused to receive the deed, and subsequently filed this bill to set aside this conveyance. Appellee insists, that he has fully performed his part of the agreement, by conveying to appellant all the lots embraced in the agreement, and insists upon the contract as it was executed.

The evidence seems to be rather inconclusive, as to what were the precise terms of the contract between the parties. It is, however, almost certain, that appellant understood he was obtaining title to the undivided half of lots six and ten, in addition to the others, and he objected and refused to receive the deed when informed by Lockwood, that those lots were not embraced in it.

It seems, that, while negotiations were progressing for the trade, appellant went with appellee and saw the property. At that time he was only informed, that one lot in the inclosure was not included in the interest of appellee in the property, which he was offering to sell to appellant. He was then informed, that the north-east corner lot belonged to the estate of Haywood. It also appears, that lots six and ten were in the inclosure. Under these circumstances it was natural for him to conclude, that all of the property inclosed and used with the house belonged to, and formed a part of the premises being sold. Appellee was offering to sell his interest in the Fox river house property, and being shown the house and inclosure, and only informed that one lot therein did not belong to him, appellant had the right to suppose, and must have supposed, that he would obtain the title to the undivided half of all but the lot which was then excluded. There is no evidence to show, or from which it can be inferred, that he had any means of knowing that appellee intended to exclude lots six and ten from the operation of the agreement. Lot ten was inclosed with, and adjoining the house, and had on it two cisterns, supplied with water from the roof of the house, and used for, and in connection with, the property. There is nothing more natural than that he would believe, under these circumstances,

that he was obtaining this lot as much as either of the others. And lot six being inclosed with the lots conveyed and used with, and as a part of, the Fox river house property, and not being pointed out, or otherwise excluded from the sale, he must have supposed it was embraced in the agreement.

If, however, appellee did not intend to sell his interest in these two lots, and did no act to encourage the mistake, then appellant would have no ground of complaint, as it would be his misfortune, and not appellee's fault. But if the latter induced the erroneous belief by appellant, that he was obtaining all of the lots embraced in the inclosure but the lot in the north-east corner, and did no act to undeceive him, then he should be required to execute the contract as appellant was induced to understand it. We think the evidence proves, that appellee designed to mislead appellant in the belief, that he was acquiring title to lots six and ten with the others. He had proposed to sell him his interest in the Fox river house property, took him to the premises, showed it to him, and only informed him, that he was not the owner of one lot in the inclosure embracing the house. If he did not intend to sell the two lots he should have so informed him. It would be, to say the least of it, bad faith to permit appellee to afterward say, that these lots were not intended to be included in the exchange.

That appellant understood he was acquiring appellee's interest in these lots, appears from the fact, that Lockwood, who was employed to write the deed from appellee to appellant, understood they were embraced in the trade, and so prepared the deed, but they were stricken out at the instance of appellee before he executed it. Lockwood gives it as his impression, that he obtained the description of the property from conveyances to appellee, which were furnished him by the son of appellee. He also states, that he delivered the deed for the land to appellee, before appellant was informed of the contents of the deed conveying the lots, and that appellant was not satisfied with the delivery of his deed when he learned it, claiming that he had not received title to a sufficient number of lots. He states, that he was not present when the contract was

entered into, and did not hear the agreement between the parties.

McNeal testifies, that he heard a conversation between the parties after the trade had been made, in which appellee stated that he sold all of the lots in the inclosure but one. That he had sold the lot on which the two cisterns were situated. This witness says he went to hear the conversation, and he must be presumed to have understood what was said by the parties in reference to what was admitted to have been sold, as that was the question in dispute. Prentice, who was present a portion of the time the parties were trading, says that he does not remember, precisely, what was said, more than appellant was purchasing appellee's interest in the property, and that appellant inquired whether appellee's interest in the property was the same as that of witness, and appellee informed him that it was. It appears that this witness, at that time, held an interest in the two lots about which this controversy has arisen, and the evidence shows, that appellee claimed the same interest in these lots as was held by Prentice.

It is true, that this witness thinks something was said about appellee's interest in the property being that which was purchased by him from Delano. He is not certain, but says, in the conversation, in reference to making a quitclaim deed for the property, it was to be for what Beauprie purchased of Delano, or which appellee had purchased of Beauprie, but is uncertain which. This witness states, that appellee claimed to have obtained his title to all of the lots, including six and ten, from Beauprie.

It also appears, that, previous to the sale from appellee to appellant, Beauprie had sold to appellee an undivided half of the lots embraced in this deed, as well as lots six and ten. And, prior to that time, Delano had conveyed lots six and ten to Beauprie. It also appears, that, before this sale was made, appellee and Prentice had conveyed six and ten to Levins, so that he was unable to convey these lots to appellant. An attentive consideration of the evidence satisfies us that appellant believed, at the time, that he was purchasing all the lots,

as he claims, and that appellee so acted as to induce that belief. That in doing so he perpetrated a fraud upon appellant, which authorized him to insist upon a rescission of the contract. The court below, therefore, erred in dismissing appellant's bill, and the decree is reversed and the cause remanded.

Decree reversed.

ALEXANDER M. BRUEN *et al.*,
v.
HERMAN BRUEN *et al.*

1. CHANCERY—*opening a decree.* When a defendant in chancery who has only had notice of the suit by publication, and against whom a decree has been rendered, petitions the court, under the fifteenth section of the chancery act, to be heard touching the matter of such decree, and also has given notice of such proceedings to the opposite party, it is not error for the court to set aside such decree, where, after such notice and petition filed, the defendant files his answer and also a cross bill, and decree is rendered upon the cross bill by default against the complainants in the original bill.

2. NOTICE—*whether necessary.* In such case, by the terms of the statute, notice is not required to be given to the opposite party, that a petition will be presented; but this court is of the opinion, that notice should be given before setting aside the original decree, the only condition being, the payment of costs.

3. SAME—*time when notice should be given.* The time when such notice should be given is not material, so that the opposite party has it, before the court acts in the matter. The petition may be first filed, and notice given afterward.

4. VENUE—*change of on motion of court.* In such case, after petition filed, and the defendant has answered, it was not error for the court, on its own motion, to change the venue to another circuit, he having been counsel in the cause. And the court to which the cause is sent thereby obtains complete jurisdiction over the persons of the plaintiffs to the original suit.

WRIT OF ERROR to the Circuit Court of Grundy county.

This was a suit in chancery instituted by Alexander M. Bruen and Louisa J. Bruen, in the Circuit Court of La Salle county, against Philo Lindley and Herman Bruen, to set aside and cancel a certain deed for lands, which Herman Bruen had caused to be put upon record, by Lindley, the recorder. Lindley had no interest in the subject matter of the suit. A decree was taken by default, and afterward the defendant Bruen filed his petition to open the same, and for leave to answer, which was granted; whereupon, the court changed the venue to the Circuit Court of Grundy county, on its own motion, having been counsel in the case. The further facts in the case are stated in the opinion.

Messrs. LELAND & BLANCHARD, for the plaintiffs in error.

Mr. GEORGE C. CAMPBELL, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only points made in this case are, that the decree was improperly opened, and that the Circuit Court of Grundy county did not obtain jurisdiction of the persons of Alexander M. Bruen and Louisa J. Bruen.

It appears, that, on the fifteenth of November, 1853, in the Circuit Court of La Salle county, a decree, by default, was rendered in favor of Alexander M. Bruen, and against Philo Lindley, who was duly served with a subpœna, and Herman Bruen, a non-resident, against whom a notice was published.

The object of the bill, on which the decree was rendered, was to set aside and cancel a certain deed for lands which Herman Bruen, the grantee therein, had caused to be put on record by Lindley, the recorder. Bruen was the only party interested in the subject matter of the decree.

On the first of November, 1855, Herman Bruen served a notice upon Alexander and Louisa J. Bruen, accompanied by his petition, that he would, at the November Term, 1855, or as soon thereafter as counsel could be heard, apply to have the above decree set aside, and for leave to answer.

The petition presented a history of the case, and alleged, that the decree was unjust, and rendered in his absence without service of process, or of a copy of the bill, and without his knowledge, and that he knew nothing about it until in September, 1855.

The petition was not filed until the May Term, 1856, whereupon, on motion of Herman Bruen, the decree against him was opened, and leave given to answer, and an answer filed, when the judge of the La Salle Circuit Court, on his own motion, changed the venue to Grundy county, he having been of counsel in the cause.

In January, 1857, a notice was served upon A. M. Bruen and Louisa J. Bruen, reciting the fact, that the first decree had been opened, at the May Term, 1856, of the La Salle Circuit Court, that an answer had been filed then, and the venue changed to Grundy county, and that, at the March Term of that Court, a motion would be made that they file a replication to the answer, and in May, 1857, a similar notice was served on them.

In June, 1857, leave was given Herman Bruen to file a cross-bill, which was filed in October, 1857, and in February, 1859, on leave granted, an amended cross-bill was filed. Notice of the pendency of this cross-bill was given by publication, and the defendants, A. M. and Louisa J. Bruen, defaulted, and the bill was taken for confessed, and the cause referred to the master in chancery to take proofs.

Section fifteen of the Chancery Code, under which the proceeding originated, is as follows: "When any final decree shall be entered against any defendant who shall not have been summoned or notified to appear as required by this chapter, and such person, his heirs, devisees, executors, administrators, or other legal representatives, as the case may require, shall, within one year after notice in writing, given him or them of such decree, or within three years after such decree, if no such notice shall have been given as aforesaid, appear in open court and petition to be heard, touching the matter of such decree, and shall pay such costs as the court shall deem reasonable in that behalf; the person so petitioning may appear and answer

the complainant's bill, and, thereupon, such proceedings shall be had as if the defendant had appeared in due season and no decree had been made. The decree shall, after three years from the making thereof, if not set aside in manner aforesaid, be deemed and adjudged confirmed against such non-resident defendant and all persons claiming under him, by virtue of any act done subsequent to the commencement of such suit; and at the end of the said three years, the court may make such further order in the premises as shall be required, and shall be just." Scates' Comp. 140.

It is apparent from the terms of this section, that no notice is required to be given to the party obtaining the decree, that a petition will be presented, the only condition appearing to be, the payment of such costs as the court may deem reasonable in that behalf. On general principles, however, we are inclined to think, notice should be given in every case before the rights of a party can be taken away. The time when the notice should be given is not material, so that the opposite party has it before the court acts. The petition may be first filed and then notice given afterward.

This, we think, was substantially done in this case. The La Salle Circuit Court did no more than to allow the answer to be filed, and then, very properly, having been of counsel in the cause for the complainants, directed a change of venue. The original decree was not set aside, as the record shows, until after the final decree on the cross-bill, of the pendency of which, the complainants in the original bill, and plaintiffs in error here, had due and legal notice by publication.

We are, therefore, of opinion that the decree was properly opened to let in the answer, and that the Circuit Court of Grundy county had complete jurisdiction of the persons of plaintiffs in error, by the change of venue on the motion of the court for the reason given.

This being the only point made, the decree must be affirmed.

Decree affirmed.

STATE OF ILLINOIS
v.
MICHAEL L. SULLIVAN, impleaded, etc.

1. SUBSCRIPTIONS — *made to pay bounties to volunteers — when will be refunded by imposition of a tax.* Where, under an act of the legislature authorizing the levy of a tax to pay bounties to volunteers, a fund was raised for such purpose, by subscription, on the faith, that the money thus advanced would be refunded by the levy of the authorized tax, and by means of such subscription the requisite number of volunteers were obtained, and such tax was subsequently voted, — *held,* that by this law an implied power was given to levy and collect a tax to refund money advanced by individuals after the passage of the act, on the faith of the expected tax, and which was used for the very purpose contemplated as the object of such tax.

2. FORMER DECISIONS — The case of *Drake* v. *Phillips,* 40 Ill. 388, explained; also, the cases of *Briscoe* v. *Allison* and *Misner* v. *Ballard,* decided at the January and April Terms, 1867, commented upon.

3. TAXES — *concerning review of assessment — majority of board of revisors sufficient.* Where the assessor and town clerk met, and duly organized the board for the purpose of reviewing the assessments, and no person appeared before them to object, their action is valid. The law expressly authorizes a majority of the board to reduce an assessment.

4. SAME — *right of objection — when not exercised — when will not invalidate proceedings.* And even if a person would have the right to appear before them and object to final action without the presence of the supervisor, yet the entire collection of taxes cannot be arrested, because of the absence of this member, it appearing, that the other two members met and duly organized and no one appeared to complain of the assessment.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an application made at the May Term, 1866, of the County Court of Livingston county, for judgment against the delinquent lands of said county for the taxes of 1865, and afterward removed to the Circuit Court of said county, where the cause was tried by the court, without a jury, on motion for a judgment against the lands for the taxes due thereon, which motion the court denied, and judgment was entered and execution awarded against the plaintiff in error, to reverse

which judgment the case is brought to this court by writ of error. The further facts in this case are fully stated in the opinion.

Mr. CHARLES J. BEATTIE, for the plaintiff in error.

Messrs. HARDING & FOSDICK, for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application for judgment against certain lands for taxes. The application was denied in the Circuit Court.

The legislature passed a law, which took effect February 2, 1865, authorizing certain counties therein named, and including the county of Livingston, whence this suit comes, to levy a tax to pay bounties to volunteers for the army of the United States. Subsequent to the passage of the law, and about the last of February or first of March, 1865, a public meeting was called in the town of Sullivan, and a subscription paper circulated for the purpose of raising, immediately, a fund sufficient to procure the requisite number of volunteers, to save the town from the impending draft. These subscriptions were made with the expectation that the money thus advanced would be refunded by the imposition of a tax; and, at the same meeting a notice was given, as required by the act, of another meeting to vote for or against the bounty tax. A committee was appointed at the first meeting to secure the volunteers with the money thus subscribed, and this was accomplished. At a subsequent meeting, the bounty tax was duly voted.

It is now objected, that, although, under the law, a tax might have been collected for the purpose of paying bounties to volunteers thereafter enlisting, there was no power to levy and collect a tax to refund money already advanced by individuals for the same purpose. To have given the law this construction would, probably, have defeated its object. The draft was at hand, and it is a just inference from this record, that it could not have been averted if the town had been obliged to wait the imposition and collection of a tax. The town, in voting the tax, simply recognized its moral obligation to refund money which had been

advanced by individuals for the general good after the passage of this law, and on the faith that the town would vote the tax. No question is made about the legality of the vote, and it cannot be denied that its object was within the spirit of the enabling act. When municipalities voluntarily and fairly impose upon themselves a tax, falling within the scope and spirit of a legislative grant of power, and for the purpose of refunding money that has been received and expended for the public benefit, we are not willing to deny such power of self-taxation, on the ground, that it is not within the strictest letter of the statute.

We have already made several decisions upon this subject. In *Drake* v. *Phillips*, decided at the April Term, 1866 (40 Ill. 388), we held that a tax could not be collected to refund moneys advanced by individuals to procure volunteers, by virtue merely of the taxing power granted in the general township laws. But, if the act of the legislature we are now considering was applicable to that case, it was not brought to our notice. Being a private act, it probably was not within the knowledge of counsel, as it was not within that of the court. In the case of *Briscoe* v. *Allison*, decided at the January Term, 1867 (*ante*, p. 291), where an act of the legislature had authorized certain counties to issue county orders to persons enlisting in the army, and the county issued orders on its treasury to certain persons who had enlisted after the passage of the law, but prior to the passage of the resolution authorizing the orders to be issued, it was held, a tax might be collected to pay all orders issued to persons enlisting after the passage of the act, though not to persons enlisting before its enactment. In the case of *Misner* v. *Ballard*, decided at the present term (*post*), we hold, a tax may be levied to refund private subscriptions of this character, but that case comes from a county to which a different law was applicable from the act now before us. In that case the power was expressly given, and in this we think it was given by implication so far as relates to money subscribed after the passage of the law, on the faith of the expected tax, and used for the very purpose contemplated by the law as the object of the tax.

It is also objected, that the supervisor did not meet with the assessor and town clerk to revise the assessments. It appears by the town records, that the assessor and clerk met and no person appeared to object. We are of opinion, that two of these officers could meet and organize the board, and that their united action would be valid. The law expressly authorizes a majority of the board to reduce an assessment. Even if a person appearing before them to complain of the assessment would have the right to object to final action without the presence of the third member of the board, yet we are not willing to hold, that the entire collection of taxes must be arrested because all the three officers were not present, if it appears that two of them have met and duly organized, and no person has appeared to complain of the assessment.

It is also objected, that the assessor was not properly sworn into office. Counsel do not point out in their brief the alleged defect in his oath, and we discern none. The record shows he was duly sworn before a justice of the peace.

We hold the objections to the assessment not well taken, and the judgment must be reversed and the cause remanded.

Judgment reversed.

TOLEDO, PEORIA & WARSAW RAILWAY COMPANY

v.

RUSSELL B. FOSTER.

1. RAILROAD COMPANIES — *neligence of — for not sounding a bell or whistle at street crossings.* In an action against a railroad company for stock killed by one of its locomotive engines, near a street crossing, while running one of its trains through the corporate limits of a town, — *held,* that if such injury occurred before the train reached the street, and the bell or whistle of the locomotive was not sounded as required by the 38th section of the general railroad act, then, under the statute, the company was guilty of negligence, and liable for the injury occasioned thereby.

2. SAME. And in such case, the place where the injury occurred, as also the question, whether the company was running its train at too great a rate of speed, are matters of fact for the determination of the jury.

3. SAME—*when injury occurs at a place, where the statute requires no signal—common law governs.* And if the injury occurred after the locomotive had passed the street, and at a place where the statute does not require the signal to be given, in that case, it is a question for the jury to determine whether or not, an omission to give the signal by sounding the bell or whistle, amounts to such negligence as will render the company liable for the injury done.

4. FORMER DECISIONS. The case of the *Galena & Chicago Union R. R Co.* v. *Dill,* 22 Ill. 264, referred to, as in point with this case.

5. NEGLIGENCE—*when not a question of fact.* Negligence is a question of fact, except when it consists in the omission of a duty imposed by positive requirement of law.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action brought by appellee before a justice of the peace, against appellant, for the killing of his cow with their engine and cars. The trial before the justice resulted in a judgment against appellant, from which an appeal was prosecuted to the Circuit Court, where another trial was had, resulting in a verdict for appellee. A motion for a new trial was entered, which was overruled by the court, and a judgment was rendered on the verdict, to reverse which the case is appealed to this court.

It appears from the evidence, that the animal was killed by the passenger train in January, 1866, within the corporate limits of the town of Fairhaven. Several persons testified that they saw the occurrence, and state that it took place on or near the road or street crossing. It appears, that the train was running at the rate of fifteen or twenty miles an hour. And the evidence strongly preponderates to establish the fact, that the whistle was not sounded nor the bell rung, until the engine was nearly in contact with the animal. That the rate of speed was so great, that the train passed the depot, and had to back up

to the station. It is contended, that the evidence shows that the cow was not killed until the train crossed the street, and that appellant was not therefore liable under the thirty-eighth section of the railroad law.

It seems to be established, that when the animal was first seen she was west of the crossing, and that the train was coming from that direction. When thrown from the track she lay east of the street, but whether she ran that distance before being struck, or whether she was carried from the west side of the crossing to the place where she lay, by the engine, does not very clearly appear. But it does appear, that the bell was not ringing or the whistle sounding, when she was first noticed and the train was approaching. If the collision occurred before the train reached the street, then, under the statute, the company were guilty of such negligence as would render it liable for the injury which resulted therefrom. Whether it so occurred was a question for the determination of the jury.

On the contrary, if the cow was killed after the engine had passed the street, and at a place where the statute did not require the signal, still it was a question for the jury, under the common law, to say whether it was negligence. In the case of *Galena & Chicago Union Railroad Co.* v. *Dill*, 22 Ill. 264, it was held, that where the statute failed to require a railroad company to ring a bell or sound a whistle, the parties were left to their common law rights and duties. That both parties were bound to the use of every reasonable precaution to avoid injury to the other, and that it was a question for the determination of a jury whether it was, under all the circumstances, negligence for the servants of the road to omit the ringing of the bell or sounding of the whistle. It is for them to determine whether such acts would have tended to prevent the injury. That negligence is a question of fact, except it consists in the omission of a duty imposed by positive requirement of law. Our experience teaches, that while the sound of a bell might, and, perhaps, would not alarm cattle, and cause them to leave the track, still the sound usually made for the purpose by the whistle, ordinarily does have that effect when made in proper time.

If either ringing the bell or the sounding of the whistle would have prevented the injury, it was the duty of the servants of the company to have done so, although at a place where the statute has omitted to make the positive requirement. The common law requiring all reasonable efforts by both parties to avoid injury, it was for the consideration of the jury to say whether the sounding of the whistle was calculated to avoid the collision, and whether it was reasonable to require it. It was also for the determination of the jury, whether the company were running their train at too great a speed through or into a populous town, where persons and animals are constantly passing and repassing, and where there is necessarily great danger of injury to such persons and property. They seem to have passed upon these questions, and we are not prepared to say that their verdict is not sustained by the evidence. Appellee asked no instructions, and those asked by appellant were all given, and hence, no question arises upon the law as given to the jury. We perceive no error in this record, and the judgment is therefore affirmed.

Judgment affirmed.

TOLEDO, PEORIA & WARSAW RAILWAY COMPANY

v.

MARTIN ARNOLD.

1. DAMAGES—*measure of for killing stock—when compensatory.* In an action on the case against a railroad company for stock killed by its trains, where such injury was purely accidental, and resulted simply by reason of the failure of the company to fence its road, the measure of damages is the value of the property destroyed.

2. SAME—*vindictive will not be allowed.* In such case, where aggression and malice are not present, the claim to compensation rests solely upon the value of the property destroyed, and a recovery cannot be had beyond that amount.

3. SAME—*when excessive—verdict will be set aside.* And when the damages given are greater than the proof allowed, the verdict will be set aside, as not warranted by the evidence.

Writ of Error to the Circuit Court of Tazewell county; the Hon. James Harriott, Judge, presiding.

This was an action on the case brought by defendant in error, in the Circuit Court of Tazewell county, to recover damages for stock alleged to have been killed by the cars, on the railroad of the plaintiff in error, by reason of the failure of the company to fence its line of road. The case was tried before a jury, who returned a verdict for the plaintiff for $441; a motion for a new trial was made, and overruled by the court, and judgment rendered on the verdict; whereupon, the defendant prosecuted a writ of error to this court.

Messrs. Ingersoll & Puterbaugh, for the plaintiff in error.

Mr. B. S. Prettyman, for the defendant in error.

Mr. Justice Breese delivered the opinion of the Court:

The only ground on which this court can interfere in this case, is that the damages are greater than the proof allowed.

The action was brought to recover damages for killing certain live stock of the plaintiff, not intentionally, by the defendants, or by proving negligence in running their trains, but by the inference of negligence by reason of their failing to fence their road.

The plaintiff's claim to compensation manifestly rests upon the value of the property destroyed, and upon nothing else. The measure of the damages would then be, necessarily, the value of this property. It is not a case for punitive damages, or vindictive damages, as claimed by the defendant in error. It comes under that class denominated compensatory damages, which are given in cases where aggression and malice are not present, and they are intended to furnish actual compensation, as near as may be, for the actual injury done. To illustrate: A happens, accidentally, in the performance of a lawful act, in a lawful manner, to kill B's horse. It would be preposterous to contend, that B should punish him in damages beyond the value of the horse, for an act he did not intend to do. So here, there

is no aggression or malice pretended, but a mere accident, for the occurrence of which the plaintiff was responsible in a certain degree, in allowing his stock to roam about on land traversed by a railroad. The law pardons this, his negligence, but it does not require smart money shall be given to him, over and above the just value of his property destroyed. No circumstances of aggravation are shown or pretended. The proofs in the cause show, that the total net value of the animals killed, and proved to be the property of the plaintiff, was four hundred and eleven dollars. The verdict was for four hundred and forty-one dollars, thirty dollars more than the proved value of the property. There is no proof whatever, that the steer killed was the plaintiff's, nor is it claimed in the declaration. The verdict is not warranted by the evidence. The amount of the recovery is unjust, and cannot be sanctioned.

The judgment must be reversed and the cause remanded.

Judgment reversed.

ILLINOIS CENTRAL R. R. CO., and N. W. COLE,

v.

WILLIAM T. WHITTEMORE.

1. RAILROAD COMPANIES — *concerning violation of rules of — by passengers — refusal to surrender ticket — and non-payment of fare — distinct offenses.* The refusal of a passenger to surrender his ticket to the conductor when demanded, does not constitute the same offense as the non-payment of fare, and the statutory prohibition against the expulsion of passengers for the latter offense, except at a regular station, does not apply to the former case.

2. SAME — *when may expel at a place other than a regular station.* A railroad company may expel a passenger from its train, at a place other than a regular station, for the violation of any reasonable rule, other than that of non-payment of fare.

3. SAME — *in what case — passenger can only be expelled at a regular station.* The statute forbids the expulsion of a passenger at a place other than a regular station, only in case of a refusal to pay fare. And neglect by a passenger to purchase a ticket before entering the train, when required by the rules of the company, in substance amounts to a refusal to pay fare, and justifies an expulsion only at a regular station.

4. SAME—*may require an observance of all reasonable rules.* A railroad company has the right to require of its passengers the observance of all reasonable rules, calculated to insure comfort, convenience, good order and behavior, and secure the safety of its trains, and the proper conduct of its business as a common carrier.

5. SAME—*expulsion by—for violation of rules—a common law right.* When a passenger wantonly disregards any reasonable rule, the obligation to transport him ceases, and the company may expel him from the train, using no more force than may be necessary for such purpose, and not at a dangerous or inconvenient place. This is a common law right, and has been restricted by statute only in cases of non-payment of fare.

6. SAME—*what will be considered a reasonable rule.* A rule adopted by a railroad company, requiring passengers to surrender their tickets to the conductor when called for, is a reasonable one, and may be enforced.

7. INSTRUCTIONS—*the court must determine whether a rule adopted by a railroad company is a reasonable one.* It is error for a court to submit to the jury the question, whether a rule adopted by a railroad for the government of its business, is a reasonable one, or not. Such question is one purely of law, and must be determined by the court.

8. EVIDENCE—*showing necessity of rule—admissible.* But it is proper for the court to admit testimony, in regard to the necessity of such rule.

APPEAL from the Circuit Court of Marshall county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

The facts in this case are sufficiently stated in the opinion.

Messrs. WILLIAMS & BURR, for the appellants.

Messrs. INGERSOLL, PUTERBAUGH & SHAW, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trespass, brought by Whittemore against the Illinois Central Railroad company and N. W. Cole, a conductor in the service of the company, for wrongfully expelling the plaintiff from a train. It appears, the plaintiff had taken passage from Decatur to El Paso, and had procured the necessary ticket. After the train passed Kappa, the station preceding El Paso, the conductor demanded the plaintiff's ticket, which the latter refused to surrender without a check. This the conductor refused to give, and after some controversy with the

plaintiff, stopped the train and with the aid of a brakeman expelled the plaintiff. There is considerable evidence in the record given for the purpose of showing, that, even admitting the right of the defendants to expel the plaintiff, an unnecessary and wanton degree of violence was used, from which the plaintiff received a permanent and severe injury. As, however, the case must be submitted to another jury, we forbear from any comments on this portion of it. The jury gave the plaintiff a verdict for three thousand, one hundred and twenty-five dollars, for which the court rendered judgment, and the defendants appealed.

In sustaining a demurrer to the fourth plea, and in giving the instructions, the Circuit Court held, that, although the rules of the road required the conductor to take up the plaintiff's ticket, and notwithstanding he may have refused to surrender it when demanded, the defendants had no right to expel him from the cars, except at a regular station. In support of this position, it is urged by counsel for appellee, that the refusal to surrender the ticket was merely equivalent to a refusal to pay the fare, and that the statutory prohibition against the expulsion of passengers for this cause, except at a regular station, should be applied to cases like the present. We held, in the case of *C. & A. R. R.* v. *Flagg*, decided at the January Term, 1867 (*ante*, p. 364), that the neglect to buy a ticket before entering the train, when required by the rules of the road, was the same thing in substance as the refusal to pay the fare, and justified an expulsion only at a regular station. But the refusal to surrender a ticket, for which the requisite fare has already been paid, is certainly not the same thing as refusal to pay the fare. It may be no worse offense against the rights of the railroad company than the refusal to pay the fare, but it is not the same offense. Perhaps there was no good reason why the legislature should have forbidden railways to expel a passenger only at a regular station for the non-payment of fare, and have left them at liberty to expel one at any other point, for the disregard of any other reasonable rule. But it has done so, and it is our duty to leave the law as the legislature thought proper to establish it.

What, then, is the right of a railway company in reference to its passengers? Clearly, to require of them the observance of all such reasonable rules as tend to promote the comfort and convenience of the passengers, to preserve good order and propriety of behavior, to secure the safety of the train, and to enable the company to conduct its business as a common carrier with advantage to the public and to itself. So long as such reasonable rules are observed by a passenger, the company is bound to carry him, but if they are wantonly disregarded, that obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common law right, arising from the nature of their contract and occupation as common carriers, and, as already remarked, it has been restricted by the legislature only in cases where the offense consists in non-payment of fare. *Ch., B. & Q. R. R. Co.* v. *Parks*, 18 Ill. 460; *Hilliard* v. *Gould*, 34 N. H 230; *Cheny* v. *Boston & Maine R. R. Co.*, 11 Metc. 121. If, then, the regulation requiring passengers to surrender their tickets was a reasonable one, the ruling of the court below on this point was erroneous.

That the rule is a reasonable one really admits of no controversy. It was shown by witnesses on the trial, and must be apparent to any one, that the company must have the right to require the surrender of tickets, in order to guard itself against imposition and fraud, and to preserve the requisite method and accuracy in the management of its passenger department.

The Circuit Court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration, that it is only by so holding, that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another

to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public. A similar view has recently been taken of this question in the case of *Vedder* v. *Fellows*, 20 N. Y., 126.

The judgment must be reversed; but if it appears, upon another trial, that unnecessary violence was used, the defendants must respond in damages.

Judgment reversed.

ROBERT STRAHORN *et al.*

v.

THE UNION STOCK YARD & TRANSIT COMPANY.

1. CONSIGNOR — *of property in transitu — may change its destination.* A consignor of property *in transitu* has the right to direct a change in its destination, and have it delivered to a different consignee, and the carrier is bound to obey such direction.

2. CONSIGNEE — *to enforce lien for general balance against the consignor — must have possession of the property.* And when in such case the destination is changed, and the consignee, from whom the consignment is taken, does not obtain possession of the property before notice given to the carrier that the property is to be delivered to another and different consignee, such first named consignee acquires no lien on the property, for any general balance against the consignor.

3. FORMER DECISIONS. The case of *Lewis* v. *The Galena & Chicago U. R. R. Co.*, 40 Ill. 283, being like the present one, the decision in that case must govern in this.

APPEAL from the Superior Court of Chicago.

The facts in the case are fully stated in the opinion.

Mr. J. V. LE MOYNE, for the appellants.

Mr. GEORGE C. CAMPBELL, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of trover, brought by appellants in the Superior Court of Chicago, against appellees, for the recovery of a car load of hogs. On the trial it appeared in evidence, that appellants, in September, 1866, wrote a letter to M. V. Butler, at Iowa City, in which they authorize him to draw on them for $500, and for the balance when he gets stock to the railroad; but would not like him to hold it more than a week at a time. On the back of the letter they indorsed the following:

"First National Bank, Iowa City: We will honor all drafts drawn on us by M. V. Butler.

R. STRAHORN & Co."

Butler gave this letter of credit to Hubbard, the cashier of the bank, and it seems, that an arrangement was made by which Butler could, in purchasing hogs, check on the bank to pay for hogs purchased, and then draw upon Strahorn & Co., to cover such advances. Hubbard testifies, that Butler never drew in advance of purchases, but made his checks on the bank for his purchases, and afterward drew upon Strahorn & Co., to cover such advances.

The business continued in this manner until the 30th of January, 1867, when the last draft was drawn by Butler on appellants. This draft was for $1,000, at three days after sight, and was delivered to Hubbard, the cashier, and lacked something of balancing his account with the bank. It seems, that between that date and the third of February, the bank advanced $1,295.75 to Butler, and he had, in the mean time, made deposits sufficient to cover the balance against him on the 30th of January, 1867, and to reduce the balance due the bank to $800.

On the 3d day of February, Hubbard received a letter from appellants, that they would accept no more drafts drawn by Butler. Hubbard thereupon saw Butler at the depot, and learned that the hogs had just been shipped to appellants. He insisted, that Butler should secure the bank for the money it

had advanced to purchase this car load of hogs. Butler thereupon sold the hogs to Hubbard for $1,074.80, being the amount paid for the hogs, and the sums still due the farmers of whom they were purchased, which the bank agreed to, and did afterward pay. The railroad agent at Iowa City was notified of the sale, and Butler gave up the freight receipt, and the railroad company gave to Hubbard a new one, and he directed, that the hogs be delivered to Conger & Co., on his account. Butler gave the agent at Iowa City, an order to the agent at Chicago, notifying him, that he had sold the hogs to Hubbard, and directing him to deliver them on their arrival to R. P. & M. Conger for Hubbard. The order was immediately sent to the agent at Chicago, and he was directed to change the name on the way-bill from Strahorn to Conger & Co.

The hogs arrived at Chicago on Sunday, the 4th of February, and were delivered to appellee. The way-bill named Strahorn & Co., consignee for account of M. V. Butler, with a line erased, and these words written in: "Consignee Conger & Co., account of W. H. Hubbard." The stock was unloaded at the yards and placed in a pen, and fed over Sunday by the order of Strahorn's agent, but the freight was not paid, and an actual delivery was not made to them.

The letter of the agent at Iowa City was received by the agent at Chicago, who sent it to the agent of the railroad company, who had unloaded the hogs and delivered them to the stock company. On Monday morning, the 5th, the stock-yard agent informed the division agent of the yard, that the consignment had been changed from Strahorn & Co., to Conger & Co., and that he must change it on the books, which he did, and Strahorn & Co. were informed of the change, and that they must not sell the hogs. The hogs remained in the actual possession of the stock-yard company until they were sold. They made no actual delivery to either consignee.

On Tuesday, the 6th, the railroad agent who delivered the hogs to the stock-yard, proposed to both consignees, that the hogs be sold, and the money held by the railroad company until it should be decided which of them was entitled to receive

it, to which they both agreed. The freight, sixty-four dollars, and the stock-yard charges, eight dollars for corn, and keeping the hogs, were paid by the railroad agent. A demand was made, and a refusal to deliver the hogs, and appellants sued to recover for a conversion. The cause was tried by the court by consent, and the issues were found for defendants. A motion for a new trial was entered, which the court overruled, and rendered judgment according to the finding; to reverse which this appeal is prosecuted.

It is insisted, that inasmuch as Butler was indebted to appellants on a general balance, and as he shipped to them this car load of hogs, appellants thereby acquired such a lien on the property, as placed it out of the power of Butler to sell the property to the bank, to pay their debt against him. There seems to be no question raised as to the *bona fides* of either of these debts. Appellants' claim was for a balance due on money advanced to pay for previous shipments, while the debt to the bank was for the very money paid on the purchase of these hogs. Had Butler the power, while the property was *in transitu*, to change its destination, and to have it delivered to a different consignee? In the case of *Winne* v. *Hammond*, 37 Ill. 99, it was held, that a factor has a lien for a general balance on the property of his principal, in his actual possession, and that such possession was notice of his lien to creditors and purchasers.

In the case of *Lewis* v. *Galena & C. U. R. R.*, 40 Ill. 281, the questions were very similar to these presented by this record. It was there said, "The question then, is, has the consignor of the property which he has put in the possession of a common carrier to be carried and delivered to a designated consignee, a right to change the destination before it is delivered, and can the carrier refuse to obey the consignor's orders to that effect? The principle may be broadly stated, that a consignor of goods has the right to direct a change in their destination, and that the carrier is bound to obey such directions." In that case, as in this, the consignor was indebted to the consignee on a general balance. The court say, "It is in vain to pretend that Campbell & Woodruff had any lien or

claim on this grain; it was never in their possession, symbolically, by bill of lading, or actually, by delivery, before the notice was given to the railroad company by the consignors, that they had made advances upon it." Appellants, in this case, had not acquired possession of the hogs, any more than had the consignees of the grain, in that case. In both, the bill of lading and contract for the freight described the consignee. The carrier had, in each case, received the actual possession of the property to be transported, and in the same manner, in each case, the destination was changed by the order of the consignor. No material difference is perceived in the two cases, and that must govern this. The judgment of the court below is affirmed.

Judgment affirmed.

JOHN D. CLEGHORN
v.
THOMAS H. POSTLEWAITE *et al.*

1. ASSESSMENT — *when void.* When a party liable to taxes makes out and delivers to the assessor a list of his taxable property, which is accepted by the assessor, without question, that officer has no power afterward arbitrarily, and of his own motion, to alter it, without first giving the party assessed notice.

2. CHANCERY — *when a court of equity will restrain the collection of a tax based on an illegal assessment.* Where an assessor, after having accepted a list of taxable property, arbitrarily increases it, without giving notice to the taxpayer, and the latter has no knowledge of the increase until after the time allowed for an appeal has expired, a court of equity will restrain the collection of the tax based upon the assessment.

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was a bill in chancery filed by Cleghorn in the Circuit Court of Iroquois county to restrain the town collector from collecting taxes on $10,000 wrongfully assessed against him.

The bill alleges that the complainant commenced his residence in the town of Lodi, Iroquois county, in December, 1863 and remained there until December, following. That in June,

Statement of the case.

1864, Thomas H. Postlewaite, being the assessor of the town of Lodi, called on the complainant for a list of his taxable property, and for that purpose left a blank statement to be filled up by him; that the complainant, on the 27th day of June, 1864, filled out said blank statement, returning therein two horses, valued at $100; one watch, six dollars; amount of credits on hand, about $25,000; the statement further showed, that the indebtedness of the complainant was about $30,000; that the list was certified by the complainant as being a full, complete and perfect list of all his property liable to taxation; that the same was delivered to the town assessor, who received it without objection.

The complainant further states in his bill, that, from the time of the delivery of said list to the assessor, until in December, 1864, he believed the same was perfectly satisfactory to that officer; that in December, 1864, the said Postlewaite, then being the collector of said town, called upon him for a payment of his taxes, claiming, that the complainant's taxable property was assessed at $10,000, upon which there was due $405 taxes.

The bill further shows, that the sum of $10,000, assessed against the complainant was wholly and entirely unjust, erroneous and revengeful; that he had no knowledge of said erroneous assessment until December, 1864; that as no time during said year was he possessed, or had in hand $10,000 over and above his indebtedness; that he did not know by whom the sum was assessed against him; and that had he known that any sum was assessed different from the amount given in the list, he would have had it corrected.

The bill further alleges, that the defendant, Postlewaite, now being collector of taxes for said town, is endeavoring to collect the said sum of $405 from the complainant, and threatens to levy on property unless that sum be paid; that the complainant fears that the said town collector will destrain his property, or return said taxes as delinquent to the county collector. A copy of the list of taxable property delivered by the complainant to the town assessor is attached to the bill as an exhibit.

The bill prays for an injunction restraining the collection of

the tax, and that the said assessment be set aside, and be declared null and void. An injunction was granted by the master in chancery.

The defendant demurred to the bill. Upon the hearing, the demurrer was sustained; and upon motion the bill dismissed.

The case is brought to this court by appeal.

Mr. GEO. B. JOINER, for the appellant.

Messrs. WOOD & LONG, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The question presented by this record is not of difficult solution. When a party liable to taxes, makes out and delivers to the assessor a list of his taxable property, and which is accepted by the assessor without question, that officer has no power afterward, arbitrarily and of his own motion, to alter it, without first giving the party assessed notice. The law on this subject is too plain to be misunderstood.

Section 6 of the act of 1853 provides, that every person required to list property, shall make out, sign and deliver to the assessor, when required, a certified statement of all the personal property, moneys, credits, etc., in his possession or under his control, on the 1st day of May, of each year, for which the property is required to be listed. Scates' Comp. 1049. Section 8 provides a penalty for a fraudulent list, or for a refusal to deliver a list to the assessor when called on by him for that purpose, and section 9 provides, if the assessor believes that any property has been valued at less than its true value, in accordance with the rules and customs of valuing property for taxation, he shall value and charge such property at its true value, and shall notify the person listing such property of such increased valuation.

Section 26, of the revenue act of 1849, also provides, that the assessor shall, at the time of making the entry in his book, as required by the 16th section of chapter 89 of the Revised Laws, give to the person so assessed, a certificate of the entry so made,

of the value of the real and personal property so assessed; and the assessor shall not make any change or alteration in such entry, after having given such certificate, without giving to the person assessed, an additional certificate showing such increased assessment. Id. 1019.

The 16th section of chapter 89 gives the assessor authority to require every owner of property to give in the list under oath.

By section 2 of the act of 1853, the term "property," whenever used in the act, shall be held to mean and include every tangible thing, being the subject of ownership, whether animate or inanimate, real or personal. Id. 1047.

The law has been careful to protect an owner of property, after giving in his list of taxable property, and which has been accepted without objection by the assessor, from any interference with the list by the assessor, except on notice to the owner. This notice affords the owner an opportunity to explain and defend the list he has given in, and to the accuracy of which, the assessor might require the owner to be sworn. The law never designed that property owners should be put so completely in the power of the assessor, as he would be, did the assessor have the authority, secretly, and without the knowledge of the owner, to re-assess the property. Could he do so, there would be in many cases but slight protection to the owner.

But the appellees say, the appellant had his remedy at law, by application to the assessor, town clerk and supervisor, on the last Saturday in June, to have the assessment revised and reviewed, as provided by section 32 of this act of 1853. But the bill states, and that is admitted by the demurrer, appellant had no knowledge of this re-assessment, until the month of December following, when the collector was proceeding to collect the tax on this highly increased re-assessment. Had the notice been given appellant of the re-assessment in time for this application on the last Saturday in June, there might be some ground for the position taken by appellees, that the remedy was at law under the statute. This case shows the necessity for notice to the owner on the re-assessment. The act of the

assessor, without notice to the owner, was void, and the demurrer to the bill should have been overruled, and appellees enjoined from collecting the tax on the re-assessment, above the amount to which the property was subject when listed by the owner, and the list delivered to, and accepted by, the assessor.

The decree of the Circuit Court is reversed and the cause remanded, for further proceedings consistent with this opinion.

Decree reversed.

WELLS WILLETTS
v.
R. C. PAINE.

1. CHECKS — *laches of the holder discharges the drawer.* Where the holder of a check neglects to present it for payment until twenty-five days after it is drawn, during which time the drawees fail, he cannot have recourse on the drawer, unless he shows, that no loss occurred to the drawer through such delay.

2. Where a depositor having funds in a bank, gives a check, which the holder neglects to present for payment within a reasonable time, he cannot be held liable for non-payment in current funds, unless the holder shows, not merely, that the funds on deposit were depreciated at the date of the check, but that they were depreciated at the time of deposit, and that, therefore, the drawer had no right to draw the check, or to expect its payment in current funds.

3. BANKING — *rights of depositors.* Where a party who keeps an account with a banking house, deposits funds, which are at the time current, he has a right to insist on payment in current funds, although the funds deposited have in the mean time become depreciated.

4. If bank bills are deposited as depreciated paper, the depositor has no right to draw for par funds, or expect payment of a check thus drawn.

APPEAL from the Superior Court of Chicago.

This was a suit brought on a check dated Niles, Michigan, May 8, 1861, drawn by R. C. Paine on E. I. Tinkham & Co., Chicago, for $450, payable to St. Joseph Iron company, and indorsed to A. W. Tipton, and by him to J. L. Hartson, at

New Boston, Ill., and by him to Wells Willetts. The check was protested for non-payment June 4, 1861. The evidence is stated in the opinion of the court.

The trial in the court below resulted in a judgment for the defendant. The case is brought to this court by appeal.

Messrs. HURD, BOOTH & KREAMER, for the appellant.

Messrs. E. G. ASAY and R. S. WILSON, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the assignee of a check drawn in Niles, Michigan, upon E. I. Tinkham & Co., of Chicago, bearing date May 8, 1861, and protested for non-payment. The suit is against the drawer. The check was declared upon as a bill of exchange. It was not presented for payment until twenty-five days after it was drawn, during which time the drawees failed. E. I. Tinkham was called as a witness, and proof was made by him, that when the check was drawn the drawer had on deposit only Illinois bank bills, worth at that time from fifty to ninety cents on the dollar. It does not, however, appear when this amount was deposited, or that, at the time of the deposit, these funds were depreciated. It does appear, that Paine, the drawer, had been a depositor with the bank for several years, and that the balance standing to his credit at the date of the check, and until the failure of the bank, was larger than the amount of the check. Tinkham means, that if the check had been presented in due season he would have paid it only in the depreciated Illinois currency, and this is relied upon as entitling the plaintiff to recover, notwithstanding the *laches* in the presentation. But there is nothing in this record to show, that the bankers would have had the right to pay in depreciated funds, since it does not appear, that the funds were depreciated when deposited. If they were not, then, as decided in the case of *The Marine Bank* v. *Chandler*, 27 Ill, 525, the drawer would have had the right to insist on payment in current funds. The plaintiff is here insisting on

holding the drawer. On the face of the check and protest the drawer is discharged by the delay. The burden, then, is on the plaintiff, of showing that no loss accrued to the drawer through such delay; and to do this he must show, not merely that the funds on deposit were depreciated at the date of the check, but that they were depreciated at the time of deposit, and that therefore the drawer had no right to draw the check or to expect its payment in par or current funds. The court below instructed the jury in conformity with these views. The instruction prepared by the court, and given on its own motion, was as follows:

"As the plaintiff in this case claims to recover upon the instrument sued upon as a foreign bill of exchange, it is not necessary to inquire what the law as to checks is; treating it as such a bill of exchange, it was not presented in time to hold the defendant liable, and therefore it is necessary to inquire whether there was a sufficient excuse for not presenting it, and this depends upon the state of affairs between the defendant and E. I. Tinkham & Co. If the defendant had deposited with Tinkham & Co. what was between them considered and accepted as money, to be repaid in money, dollar for dollar, and not in depreciated bank notes, then the defendant had a right to draw the bill and expect it to be paid in currency or current money, and then he is not liable; but if his deposits were to be paid back in bank notes then in use, after they became depreciated, and he had not the right to require current money, dollar for dollar, for his deposits, then he had not the right to draw the bill or to expect the bill to be paid in currency, and then the delay in presenting it is of no consequence, and the defendant is liable for the amount, with interest, at the rate of six per cent from this date."

Under this instruction the jury found the bank bills to have been deposited as money, to be repaid in money, and not in depreciated paper, and there is nothing in the record which would justify us in reversing that finding. It is true, the

evidence is not clear upon that point, but, as we have already remarked, it belonged to the plaintiff, who had been guilty of apparent *laches*, in presenting the check, to show that no injury had accrued therefrom to defendant. In such cases the law presumes an injury until the contrary is proven. If this check had been duly presented, payment refused and notice given, the drawer would have been able to take steps for his own protection.

It is urged by counsel for appellant, that this case is like *Lawrence* v. *Smidt*, 35 Ill. 440, and *Galena Ins. Co.* v. *Kupfer*, 28 id. 332. Those cases were decided upon the theory, that the bank bills on deposit were depreciated at the time of deposit, and were deposited as depreciated paper. In that event the court decided the depositor would have no right to draw for par funds, or to expect payment of a check thus drawn. The report of the cases does not clearly show such proof to have been made, but the decision and opinion are clearly based upon the theory that such a state of facts appeared in the record. Only on that theory can these cases be reconciled with the well settled law of this court, announced in *The Marine Bank* v. *Chandler*, *ubi supra*, and in similar cases. But in the case before us no such state of facts is shown to have existed, and the jury have substantially found it did not exist.

As there was no error in the instructions given for the defendant, or in that given by the court on its own motion, and as the finding of the jury was a justifiable inference from the evidence, we must affirm the judgment.

Judgment affirmed.

DANIEL EATON *et al.*
v.
ALBERT D. SANDERS *et al.*, Executors of Ellsworth H. Hyde, deceased.

CHANCERY — *evidence, how preserved.* In proceedings in chancery the evidence must support the decree, and must be preserved in the record, which

may be done by reducing it to writing by the master or any one else under direction of the court.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOHN M. WILSON, Chief Justice, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Mr. JAMES B. GOFF, for the plaintiffs in error.

Messrs. WAITE & CLARKE, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only point made by plaintiffs in error on this record is, that the decree was rendered without any evidence to warrant it.

An examination of the allegations in the bill, and the proofs contained in the depositions, show clearly that the decree was proper.

It is true, the doctrine of this court is, that in chancery causes the evidence must be preserved in the record, and this may be done by its being reduced to writing by the master, or by any one else under the direction of the court, or it may be embodied in the decree. *Mason* v. *Bair*, 33 Ill. 195; *Waugh* v. *Robbins*, id. 181.

In this case the evidence was by depositions, which, taken with the admissions of the defendants in their answers, of the amount of money received of complainant, fully establish the allegations of the bill, that defendants violated their contract with complainant, and misapplied the money. There is no doubt, from the evidence, that they guaranteed the money advanced by complainant, and seven per cent interest thereon, and for this a decree passed, and it must be affirmed.

Decree affirmed.

DANIEL EATON *et al.*
v.
DORMAN T. WARREN *et al.*

WRIT OF ERROR to the Superior Court of Chicago.

Messrs. MILLER & LEWIS, WALLER, STEARNS & COPELAND and Mr. JAMES B. GOFF, for the plaintiffs in error.

Messrs. WAITE & CLARKE, for the defendants in error.

Mr. JUSTICE BREESE: This case is in all essential particulars identical with the preceding case, *Eaton* v. *Sanders et al.* The same facts appear in the decree by recital therein, and that is a sufficient finding. *Nichols* v. *Thornton*, 16 Ill. 113.

The decree is affirmed.

Decree affirmed.

JOHN PARKER
v.
GEORGE H. FERGUS.

1. PARTNERSHIP — *evidence of.* The statement by one defendant, that he was going into a house, nor the fact, that he occupied a portion of the house in the auction business, nor that he sold tickets for the other defendant's opera house, and acted as treasurer, and his name was printed on the bills as treasurer, prove that he was a partner in the opera house.

2. CONTRACT — *construction of.* Where a party leases a portion of a building to be used as an opera house, for a specified annual rent, and is employed to act as treasurer for the enterprise, to sell tickets, and, as rent of the house, to receive one-half of the proceeds resulting from the use of the portion used as an opera house, after deducting daily expenses, including his salary, to be deducted daily, the lessee to pay one-half of all taxes and assessments levied during the term, — *held*, that this does not create a partnership *inter se*, nor as to third persons, but it is a means of collecting his rents.

3. PARTNERSHIP — *receipt of profits.* Where a landlord furnishes the land, the teams, implements and grain to another, who performs the labor for

a crop, to be divided, when matured, this does not create a partnership; so, where one person furnishes material to be manufactured, and another employs the labor and skill in producing the result, and to be compensated by receiving a part of the manufactured articles, or a part of the proceeds when sold.

4. SAME—*joint enterprise.* It has been held, parties may engage in a joint enterprise and still not become partners, although they receive a portion of the profits. A party may receive a portion of the rents of a farm or tavern without becoming a partner. So of a clerk or an agent, who receives a portion of the profits on sales as a compensation for labor. So of a factor. So seamen may, by agreement, take a share in the profits of a whale fishing or coasting voyage as compensation for their services. To create a partnership, independent of express agreement, there must be an interest in profits as profits, and not as a mere means of payment for labor performed.

APPEAL from the Superior Court of Chicago; the Hon. JOHN M. WILSON, Judge, presiding.

This was an action of assumpsit commenced by George H. Fergus, in the Superior Court of Chicago, on the 15th of September, 1865, against John Parker and William Fagan. Plaintiff filed his declaration, containing the common counts only, with a bill of particulars. Defendant Parker filed the plea of the general issue. A default was taken against Fagan.

A trial was had at the November Term, 1865, before the court and a jury. Plaintiff, on the trial, introduced evidence, that he had performed the labor for which the charges were made, that they were reasonable and at customary rates. He also introduced evidence to prove a partnership between defendants, the substance of which appears in the opinion of the court.

The court on behalf of plaintiff gave this instruction:

"That in the agreement introduced by defendant, Parker and Fagan were partners, and if the jury believe, from the evidence, that work, labor, and materials were furnished by plaintiff to said partners, or either of them, during the existence of such partnership in the course of the business thereof, then the plaintiff is entitled to recover what the jury may believe from the evidence, such work, labor and materials were worth."

For refusing to give which, defendant Parker excepted.

The jury found a verdict for plaintiff. Parker entered a motion for a new trial, which the court overruled, and rendered a judgment on the verdict. And he brings the case to this court by appeal; and among others assigns as error the giving of the instruction.

Mr. GEORGE G. BELLOWS, for the appellant.

Mr. JOHN LYLE KING, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

If appellant was liable in this action, it was because he was a real or an ostensible partner of Fagan. There is no pretense that there was any other joint liability than that of a partner; and to establish such liability, appellee called Robert Fergus, his father, as a witness. He testified, that he had a conversation with appellant, who informed him, that he was going into the premises with Fagan, who was going to open an opera house; that appellant was already in the house, in the auction business; that when the opera house was opened, appellant attended the box office, sold tickets, and received the money; that he asked appellant if he could not get the printing for appellee, when he replied, "that he thought he could;" that appellee did the printing charged in the bill, to recover which the suit was brought; that the prices set opposite each item are reasonable, and the printing was worth what was charged in the bill; that at that time appellant showed him the article of agreement between himself and Fagan, and which, it is claimed, proves the existence of a partnership; and that Parker's name appears to the printed bills of the opera house, as treasurer; but it did not appear on them as a partner.

We do not see from this evidence any thing calculated in the slightest degree to make the impression, that appellant was a partner. The fact that he said he was going into the premises, could not be construed into a statement that he was a partner; nor could the fact, that he sold the tickets and

received the money for the opera, convey such a meaning; nor the fact, that his name was printed on the opera house bills as treasurer; nor his statement, that he thought appellee could get the printing; neither can all of these circumstances when considered together, convey such a meaning.

Then does the article of agreement, by express terms, or fair intendment, create a partnership between appellees, either as to themselves, or as to third persons? We think not. By it Parker leased the premises to Fagan, to be used as an opera house, reserves the rent, and provides for its payment, and for resuming possession if not punctually paid; also, for the lease to become void, if the rooms should be used for immoral or disorderly purposes. It is then agreed, that the lessee shall pay lessor $1,000 a year for his services as treasurer of the opera house. It is however insisted, that this clause of the agreement creates a partnership: "And the said party of the second part, in consideration of the leasing of the premises aforesaid, by the said party of the first part, to the said party of the second part, does covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns, to pay to said party of the first part, as rent of the said demised premises, one-half the proceeds resulting from the use of the said first and second stories, after deducting the daily expenses, including $1,000 yearly, as treasurer and agent of the opera rooms. Such payments to be made daily, each and every day during the full term hereof; and the said party of the second part further covenants with the said party of the first part, to pay one-half of all taxes and assessments that may be levied or assessed during the term hereby created." It will be observed, that there is no provision, that Parker shall furnish any portion of the means for carrying on the opera house, or for any control or direction in its management, or for any liability for any losses that might occur. He only received the money from persons visiting the opera house, and deducted therefrom his salary as treasurer, and his rent, and paid the remainder to Fagan.

This was evidently intended by the parties as a mode of paying the rent for the use of the rooms. It is true, that it left

the amount to be paid indefinite and uncertain, until ascertained by the receipts themselves. Then is this such a perception of profits as could, under any circumstances, be held to create a partnership? Over this entire country, we see that farmers lease their lands for agricultural purposes, and agree to receive a third or other portion of the products of the soil, and the labor of the tenant, as a payment of the rent. Again, it not unfrequently occurs, that the owner of the soil furnishes the land, the teams, implements and the seed; while another performs the labor, and they divide the product, according to the terms of their agreement, and no one ever imagined, that in either class of such cases, the parties became in any sense copartners. Again, it is of frequent occurrence, that one person having material, furnishes it to a manufacturer, who works it up for a certain portion of the manufactured product, or a share of the proceeds for which it shall be sold; and it has never been supposed, that such parties thereby became partners. And the same is true of a large class of special agreements for particular adventures and joint undertakings.

It is said by Chancellor KENT, vol. 3, p. 33, that "a person may be allowed in special cases to receive a part of the profits of a business, without becoming a legal or responsible partner; as, by agreement, he may, by way of rent, receive a portion of the profits of a farm or tavern without becoming a partner. So a clerk or agent, may be allowed a portion of the profits on sales, as a compensation for labor, or a factor a percentage on sales, without becoming a partner, when it appears to be intended merely as a mode of payment, adopted to secure increased exertion, and it is not understood to be an interest in the profits, in the character of profits. So seamen may take a share, by agreement, with the ship owners in the profits of a whale fishery or coasting voyage, as compensation for their services; and shipments from this country to India, upon half profits, are usual; and the responsibility of partners has never been supposed to flow from such special agreements." He also says, that this distinction seems to be definitely established by a series of decisions, and it is not now to be questioned.

The same rule is laid down in Collyer on Partnership, p 14, and the distinction is fully recognized. The rule is similarly stated by Story in his work on Partnership, section 32; and in Gow on Partnership, p. 17, the same rule is announced; and the adjudged cases fully sustain the text.

Then did Parker have any interest in the profits of the opera house, as profits, or did he receive them merely as a mode of payment of the rent of his building? From the entire agreement, we are of the opinion that he only received them as a mode of paying him the rent, and that such was the intention of the parties. If this be true, then the court below erred in refusing the instruction asked by appellant, and in giving the instruction asked by appellee. The new trial should have been granted, because the evidence failed to sustain the verdict, and for giving improper instructions to the jury, and refusing to give proper instructions.

The judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

FREDERICK G. PETRIE, late Sheriff of Ogle County, who sues for the use of JOHN REED,

v.

JOHN FISHER *et al.*

1. REPLEVIN—*bond in.* A sheriff took a replevin bond, and, his term of office expiring, the writ was returned without being executed. An *alias* writ being issued, was executed by his successor, without taking a new bond: *Held* that an action could be maintained on the bond taken by the first sheriff.

2. The object of a replevin bond under our statute is not merely to indemnify the sheriff, but also to furnish an additional remedy to the defendant in case the plaintiff fails to prosecute his suit with effect.

APPEAL from the Circuit Court of Ogle county; the Hon. W. W. HEATON, Judge, presiding.

The facts sufficiently appear in the opinion of the court.

Messrs. MIX & JACOBS and LELAND & BLANCHARD, for the appellant.

Messrs. LATHROP & BAILEY, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought upon a replevin bond, by Petrie for the use of Reed, against Fisher and others, the makers of the bond. A general demurrer was sustained to the declaration, and final judgment rendered, whereupon the plaintiff appealed.

It appears by the declaration, that the suit in replevin was commenced and the writ sued out on the 30th day of October, 1860, and on the same day the bond on which this action is brought was executed to Petrie, the then sheriff. Petrie, however, went out of office without executing the writ, and on the 13th of December, 1860, an *alias* writ was sued out and executed by his official successor. On the 23d day of June, 1862, the action of replevin was tried and judgment rendered for the defendant, with an award of *retorno habendo*. The goods were not returned, and, this suit having been brought upon the replevin bond, the only question presented is, whether it will lie upon a bond not given to the sheriff who actually executed the writ.

The object of a replevin bond under our statute is not merely to indemnify the sheriff, but also to furnish an additional remedy to the defendant in case the plaintiff fails to maintain his suit. The replevin act requires the sheriff to take this bond before executing the writ, and to return it with the writ to the clerk, and makes him liable in damages in case he fails to do so. These provisions are for the benefit of the defendant. The act further expressly provides, that the defendant may maintain an action for his own use, in the name of the sheriff, for any breach of the condition of the bond, and recover such damages as he has sustained. This he can do without first proceeding against the sheriff.

When, then, the appellees executed this bond, the chief object of the contract was to protect the defendant in the

replevin from injury through an unlawful taking of his property. To what particular officer the bond ran, as nominal payee, must have been wholly immaterial to the obligors. The bond was executed to Petrie, simply because he was the then sheriff, and as a means of taking from the defendant in the writ the immediate possession of certain property. This purpose was accomplished, and if we were now to allow the obligors to escape all responsibility merely because it was accomplished by the successor of the sheriff to whom the bond was nominally payable, we should disregard the object of the statute and pervert the spirit of the contract.

But, even if we construe this bond by its strict letter, in view of the fact that part of the appellees are sureties, we shall find, that there has been a breach of its conditions, which will render the obligors liable. The bond, after acknowledging an indebtedness in the penal sum of $1,800, is conditioned, that it shall be void in case Roop, one of the obligors, shall prosecute to effect a certain suit, which he has commenced against John Reed, for unlawfully taking away certain property, and shall make return thereof in case a return shall be awarded; otherwise to remain in full force and effect. The bond does not specify who is to execute the writ. It describes a certain suit as already commenced in the Ogle Circuit Court, and the obligors agree, that this suit shall be prosecuted with effect, and that the property to be replevied shall be returned, if ordered by the court, and these obligations are assumed without reference to the officer by whom the writ is to be executed, which can be in no wise material. The declaration sets forth, that the suit was not prosecuted with effect, and that the property was not returned, as ordered by the court. Here, then, was a breach of the letter and spirit of the bond, and we can perceive no reason why the defendant in the replevin should not be permitted to maintain a suit upon the bond, in the name of the obligee, and assign these breaches. The demurrer to the declaration should have been overruled.

Judgment reversed.

HORACE N. GOODRICH
v.
JOHN VAN NORTWICK.

CONTRACT — *construction of.* Where a party purchased of another a fanning mill, with an agreement, that he might return it within thirty days if it did not suit him, he became the sole judge under the contract, as to whether it suited. That question did not depend upon the opinion or judgment of others.

APPEAL from the Court of Common Pleas of the city of Aurora.

This was an action commenced before a justice of the peace by Van Nortwick, to recover back money paid to Goodrich for a fanning mill, and the case was taken by appeal to the Circuit Court of Kane county. The venue was changed to the Court of Common Pleas of the city of Aurora, where the case was tried by a jury, and a verdict found in favor of the plaintiff for twenty-five dollars. A motion for a new trial being overruled, a judgment was rendered upon the verdict. The case was brought to this court by appeal.

The evidence is stated in the opinion of the court.

Mr. CHARLES WHEATON, for the appellant.

Mr. F. M. ANNIS and B. F. PARKS, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

It appears from the evidence in this case, that appellee's son, as the agent of his father, went to appellant in the spring of 1862, and purchased and paid for a fanning mill to clean wheat. It was however understood by the parties, that if the mill suited appellee, and answered the purpose, he was to keep it, otherwise, it was to be returned within thirty days from the time the purchase was made, and the money was to be refunded.

The mill was returned within the thirty days, upon the ground that it did not suit appellee or answer the purpose for which it was purchased. Appellant, on the return of the property, refused to refund the money, and a suit was instituted before a justice of the peace for its recovery. The case was removed to the Circuit Court of Kane county, where a trial was had resulting in favor of appellant, but a new trial was granted, after which the venue was changed to the Court of Common Pleas of the city of Aurora. On a trial in that court, appellee recovered a judgment for twenty-five dollars, to reverse which, the cause is brought to this court.

But one question arises in the case, and that is as to the true construction to be given to the agreement. By this agreement did appellee have the option of returning the machine, or was he bound to show, that it failed to answer the purpose reasonably well for which it was designed? The terms of the agreement were, that if it suited and answered the purpose. It is manifest, that it was required to answer both requirements. If it did not suit appellee then he had the right to return the property, and he was by the terms of the contract to be sole judge of whether it suited him. That did not depend upon the opinion or judgment of other persons. It was a right he reserved by his contract, and having reserved the right, he could not be prevented from exercising it within the limited period.

Again, if it did not answer the purpose for which it was purchased he had the right to return it within the time. But, failing to suit, he was not bound to show that it did not answer the purpose of its purchase. All evidence therefore introduced to prove that it did not work well was unnecessary, and immaterial to the issue. It did not suit appellee, and he returned the property within the stipulated period, and according to the agreement appellee was bound to prove nothing more. The court therefore did not err in rejecting the evidence offered by appellant, to prove that the machine was capable of performing well, and would have answered the purpose for which it was sold, had it been properly used. Such evidence was outside of

the issue. We are unable to see that any error was committed by the court below in trying the cause, and the judgment must be affirmed.

Judgment affirmed.

FREDERICK BECKMAN *et al.*
v.
JOHN P. KREAMER *et al.*

1. EASEMENT—*right to fish—owner of soil.* By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow, that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law, or well established usage of the State, where the premises may be situate.

2. TRESPASS. Appellees owned a tract of land on which was a small sheet of water having an outlet to Kankakee river. Appellants, against the will of appellees, entered upon the premises for the purpose of fishing. *Held*, that the entry was a trespass, for which an action of trespass lay.

3. APPORTIONMENT—*discretion of court in apportionment of costs.* In apportioning costs under our statute, in case of an appeal from a judgment of a justice of the peace, the Circuit Court must take a view of the whole case and ascertain where the justice of it is, and so apportion the costs.

WRIT OF ERROR to the Circuit Court of Kankakee county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. H. LORING and W. H. RICHERSON, for the plaintiffs in error.

Mr. WILLIAM POTTER, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the

tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well established usage of the State where the premises may be situate. Washburn on the Law of Easements and Servitudes, 411, referring to Hargrave's Law Tracts, 5; Woolrych on Waters, 87; *Chalder* v. *Dickinson*, 1 Conn. 382; *Waters* v. *Lilley*, 4 Pick. 199; *Hooker* v. *Cumins*, 20 Johns. 90; *McFarlin* v. *Essex Co.*, 10 Cush. 304.

This right to take fish within the limits of one's land bounding upon and including a stream not navigable, is so far a subject of distinct property or ownership, that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land, or the land may be granted, while the grantor reserves the fishery to himself.

In this case the record shows, that the plaintiffs below showed either a legal or equitable title to the lands on which the lake was situate, and actual possession and cultivation of the adjacent lands described in the title papers they exhibited.

It appears the lake is a small sheet of water about seven miles from the Kankakee river, and has an outlet to that river. It abounds in fish of a choice kind. The defendants went on it with small boats they had brought with them, equipped with a seine, which they dragged in the lake, against the will and protest of the owners of the land.

This entering upon the land and fishery, which was exclusive in the plaintiffs, was a trespass upon their premises, for which the action of trespass lay, independently of the question of ownership in the fish. The plaintiffs had, therefore, a clear right to recover for the trespass.

The suit was originally commenced before a justice of the peace, and damages recovered to the amount of twenty-five

dollars. On appeal to the Circuit Court, the jury in that court rendered a verdict for plaintiffs of five dollars, and the court, on motion of defendants there, apportioned the costs, adjudging against the defendants $181.40, and against the plaintiffs the sum of $20.60, when it appears, that the costs made by the defendants below were $160, and those made by the plaintiffs below were $95.50.

The motion of defendants in the Circuit Court, was to apportion the costs "according to the statute."

It is now assigned for error, that the apportionment made by the court is not according to the statute. It is argued by plaintiffs in error, that this power to apportion the costs, where a recovery has been reduced on appeal, is not discretionary. Section 17 of chapter 26 provides, where the judgment of the justice of the peace shall be affirmed in part, then the court shall divide the costs between the parties, according to the justice of the case.

Technically, the judgment of the justice has not been affirmed in part, as the case was tried in the Circuit Court *de novo*, and a verdict rendered for the plaintiffs for a sum sufficient to carry all the costs against the defendants. But, on the admission, that the judgment of the justice was affirmed in part only, it is clear, the Circuit Court must take a view of the whole case, and ascertain where the justice of it is, and so apportion the costs. It is wholly discretionary with the Circuit Court, and on an examination of the evidence before it, contained in this record, it was not difficult to see that the justice of the case was wholly with the plaintiffs. The defendants entered upon these premises in a riotous and tumultuous manner, equipped with teams, boats, fishing tackle and seine, and, against the remonstrances of the proprietors of the land, and of the fishery, committed their trespass. Why the plaintiffs should have been required to pay more than a nominal sum in order to a technical compliance with the statute, to apportion the costs, we cannot very well see. Apportioning them as was done, if an error, it was one of which the plaintiffs in error cannot complain.

The judgment must be affirmed.

Judgment affirmed.

Syllabus.

DANIEL WESTGATE
v.
DANIEL CARR.

1. TOWNSHIP ORGANIZATION — *powers of towns in relation to stock — fences — penalties.* Under the township organization, the electors of each township, at their regular town meeting, have the power to restrain or prohibit cattle, etc., from running at large; to authorize the distraining, impounding and sale of the same for penalties, and to determine the time and manner in which such animals may go at large. Power is also given to make rules ascertaining the sufficiency of fences, and to determine what shall be a lawful fence within such town. Power is further given to impose such penalties for a violation of any by-laws of the town, except those relating to the keeping and maintaining of fences, as the town may think proper.

2. SAME — *trespass — fences — stock running at large.* Under the general law of this State, as construed in *Seeley* v. *Peters*, 5 Gilm. 130, cattle have a right to go at large, and the owner of a field upon which they may go has no right to recover for damages unless his field was inclosed by a good and sufficient fence. But this law, as thus construed, did not impose the duty of fencing as a positive obligation. It simply withheld the common law right to recover damages in cases where there was not a sufficient fence, and this on the ground that the cattle were rightfully at large.

3. SAME. The general law upon the subject of stock running at large has been so modified by the township organization act, that it is no longer of universal application. Each township, in counties which adopt the township organization law, is expressly authorized to regulate this subject for itself; and, when a town has, under this legislative authority, established rules upon this matter inconsistent with the general law as construed in *Seeley* v. *Peters*, that law, in such towns, ceases to be applicable.

4. TRESPASS — *stock running at large — fences.* Where townships have adopted rules prohibiting stock from running at large, and there are no regulations requiring fences, the owners of cattle will be liable for injuries occasioned by their stock going upon unfenced fields.

5. SAME. The right of private damages rests upon the familiar principle, that every person is responsible in damages for all injuries to others occurring from his illegal acts.

6. PARTIES — *joint liability.* Where the cattle of two several parties go upon the field of another, and injure his crops, a joint action of trespass can not be maintained against them. Each owner is separately liable for the injuries done by his own stock.

Statement of the case. Opinion of the Court.

APPEAL from the La Salle County Court.

This was an action of trespass, commenced before a justice of the peace, by Daniel Carr against Daniel Westgate, to recover for injuries occasioned to his crops by the cattle of the latter.

The trial before the justice resulted in a judgment for the defendant. On appeal to the County Court, the plaintiff recovered a judgment for $35.83. The defendant appealed to this court.

The facts are sufficiently stated in the opinion.

Messrs. O. C. GRAY and D. L. HOUGH, for the appellant.

Messrs. CHARLES H. GILMAN and BUSHNELL & AVERY, for the appellees.

MR. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action of trespass, originally brought before a justice of the peace, to recover damages done by the cattle of Westgate to the growing corn of Carr. The field was without a fence, and the plaintiff claimed damages only for injuries done in the night-time. To sustain this claim, he introduced in evidence the town records of the town of Ophir, in which the field was situated, by which the town had adopted a by-law, or ordinance, prohibiting animals to run at large at night. It was in the following words:

"*Resolved*, That cattle and calves, horses and colts, shall not run at large except by day-time from the 15th of April to the 1st of December of each year, after this date; penalty to be one dollar for each offense; and that the money arising from said fines shall be appropriated, after paying for prosecution, to buy plank for road purposes, in such district where the animals are taken up.

"April 5, 1859."

This ordinance was in force at the time of the alleged trespasses, and it was clearly proven, that defendant's cattle had run at large at night between the 15th of April and the 1st of December, and had done damage in the plaintiff's corn.

It is urged, by the counsel for the appellant, that, notwithstanding this ordinance, the want of a fence relieved the defendant of liability. The argument is, that, by the general law of the State, a good and sufficient fence is required in order to enable the owner of a field to maintain trespass, as decided in *Seeley* v. *Peters*, 5 Gilm. 130, and that this general law cannot be repealed by a township ordinance.

The sixth section of the seventh article of the Constitution directs the general assembly to provide, by a general law, for a system of township organization, and to submit the question of its adoption to the vote of the people of each county. This has been done, and the law has been adopted in some counties and rejected in others. The consequence is, that, in the same State, we have two systems of local self-government, radically unlike each other, and, in many important matters, leading to the adoption of different and even opposite rules. But these incongruities in our local law spring directly from the provision of the Constitution which permits each county to determine for itself what system it shall adopt. Under the township organization law, many subjects are remitted directly to the popular decision, which, but for the adoption of this system, would be left under the exclusive control of the legislature. And this result must have been intended by the framers of the Constitution, because it is well known, that such is, and always has been, the township system in those older States from which ours was substantially adopted. It was known to be popular government reduced to its simplest form — legislative power exercised by the popular vote of the municipality. The argument in its favor was, that each community could best determine for itself what was demanded by its own interest in matters of purely local concern, and that the town meeting where these matters were determined, trained the people to the proper exercise of civic duties. Acting on the theory which

underlies the system, the legislature has given to the people of each township power over many subjects which, so far as relates to counties not adopting township organization, are left to the exclusive management of the legislature.

Among the subjects thus committed by the legislature to the decision of each township for itself, are the running at large of cattle, and the sufficiency of fences. Section 5, of article 4, of the township law of 1861, grants to the electors of each town, at their annual town meeting, among many other powers, the power to restrain or prohibit the running at large of cattle, horses, mules, asses, hogs, sheep or goats, to authorize the distraining, impounding, and sale of the same for penalties, and to determine the time and manner in which such animals may go at large. Power is also given to make rules for ascertaining the sufficiency of fences, and to determine what shall be a lawful fence within such town. Power is further given to impose such penalties for a violation of any by-law of the town, except those relating to the keeping and maintaining of fences, as the town may think proper.

Under this act, the town of Ophir adopted the by-law, forbidding cattle to be allowed to run at large at night, and we are at a loss to understand by what language the legislature could grant the power to enact this by-law, if it be not grated in the foregoing provisions. It is urged, that only the power to impose penalties is given, and not the right to prosecute a private action for damages. But the penalties are imposed in behalf of the town, and to secure obedience to its laws. The right to private damages rests upon the familiar principle, that every person is responsible in damages for all injuries to others accruing from his illegal acts. The question in this case was, whether Westgate's cattle were lawfully at large when they entered in the night Carr's field of corn. The decision in *Seeley* v. *Peters* proceeds solely on the ground, that the defendant had the right to allow his cattle to roam at large. But in this case the defendant had not that right, and the application of the same principles which discharged the defendant in that case, would make him liable in this. The injury for which this

suit is brought, arose directly from Westgate's violation of law, while Carr has violated none, for there was no law requiring him to fence his field. Under the general law of the State, as construed in *Seeley* v. *Peters*, cattle have a right to go at large, and the owner of a field upon which they enter shall have no claim for damages, unless his field was inclosed by a good and sufficient fence. But this law, as thus construed, did not impose the duty of fencing as a positive obligation. It simply withheld the common law right to recover damages in cases where there was not a sufficient fence, and this, on the ground that the cattle were rightfully at large. But this general law has been so far modified by the township organization act, that it is no longer of universal application. Each township, in counties which adopt the township organization law, is expressly authorized to regulate these subjects for itself; and when a town has, under this legislative authority, established rules upon this matter, inconsistent with the general law as construed in *Seeley* v. *Peters*, that law in such towns ceases to be applicable. Under the regulations or by-laws of the town of Ophir, cattle could no longer rightfully roam at large in the night, during certain periods of the year, and the obligation to protect fields by a sufficient fence against their entry at night, during such periods, necessarily ceased. The evidence offered in regard to the condition of the plaintiff's fence was, therefore, properly excluded.

It is urged, that the court erred in excluding the docket of a justice of the peace, offered by the defendant for the purpose of showing the plaintiff had recovered a judgment against one Sproule for the same injuries to his corn by Sproule's cattle, for which this suit was prosecuted against Westgate. The docket was excluded because identified, not by the justice, but by some third person. The reason assigned may not have been a valid one, but the exclusion was nevertheless proper, because the proposed evidence was wholly immaterial. It mattered not what injuries had been done by Sproule's cattle, or what damages Carr may have recovered against him for such injuries. Westgate was liable for injuries which the proof might show

had been done by his own cattle, even though damages for the same injuries had already been improperly recovered from Sproule. If the cattle of both Sproule and Westgate had been trespassing, they were not jointly liable; and if, in a former suit, a jury had assessed against Sproule, any portion of the damage done by Westgate's cattle, a wrong had been done to Sproule, but this did not extinguish the liability of Westgate. The suit against Sproule could not be retried in the present case, for the purpose of showing that damages for which Westgate only was liable had been improperly assessed against Sproule. If the latter chose to acquiesce in an unjust verdict, it was his own affair, and could not aid Westgate. The simple question in this trial was, What damage did the evidence show to have been done by Westgate's cattle to Carr's corn?

On this question the docket of the justice could shed no light. It was proper, in order to prevent the jury from presuming all the damage in the corn to have been done by Westgate's cattle, to allow him to prove that other cattle were in the field, and ranging on the adjacent prairie, with, of course, the same opportunities for entering the field which Westgate's cattle had, and this proof he was allowed to make. The verdict was for thirty-five dollars and eighty-three cents, and the evidence shows, this verdict could not have been designed to cover all the damage done in the field, which was proved to be much greater, but must have been found upon the testimony showing how many times Westgate's cattle had been seen there, and the number of the cattle, and the quantity of corn they would destroy in a night.

The only objection seriously urged to the instructions relates to the question already considered — the effect of the town by-law, and on that subject nothing further need be said. The case was properly submitted by the court to the jury. The judgment is affirmed.

Judgment affirmed.

Syllabus.

THE STATE OF ILLINOIS
v.
JAMES M. ALLEN.

SAME
v.
CHARLES ATKINSON.

1. ASSESSMENTS — *how equalized as between townships.* In equalizing assessments as between the townships of a county, the board of supervisors are only authorized to increase or diminish the aggregate valuation of real estate, by adding or deducting such sum upon the hundred *dollars*, as may, in their opinion, be necessary to produce a just relation between all the valuations of real estate in the county.

2. The word "dollars" has evidently been accidently omitted after the word "hundred" in the fifteenth section of the township organization law of 1861.

3. A board of supervisors are not authorized by law to add a certain sum to each acre of land in a township, in equalizing the assessments of real estate as between the townships of a county. Equalization must be by valuation.

4. DELEGATED AUTHORITY — *when exceeded.* It is a familiar principle, that, in the exercise of delegated power, all acts within the scope of the authority will be sustained, where such acts can be separated from those in excess or outside of the power. But, where the acts within the power are so intimately connected with those outside of the power that they cannot be separated, then the entire action of the agent or officer must fail.

5. SAME — *levying a tax in excess of that authorized.* A township authorized by law to levy a tax of three per cent for bounty purposes, exceeded its power by levying five per cent. The county clerk rejected the two per cent in excess, and extended a tax of three per cent on the collector's book. *Held*, that the action of the township in exceeding its authority did not vitiate the legal tax of three per cent. The action of the county clerk was sustained.

6. Where township authorities, at their regular town meeting, voted a bounty tax for three consecutive years, having only the power to vote it for one year, the tax for the year authorized would be legal, although the tax for the other two years may be otherwise.

7. If a board of supervisors act illegally in changing assessments of real estate, it will not vitiate, alter or change the legal acts of the assessors of the towns. Until legally changed or vacated, their assessments are binding on the tax-payers.

Statement of the case.

APPEALS from the Circuit Court of Henry county; the Hon. IRA O. WILKINSON, Judge, presiding.

The above cases involved the same facts, and were considered together.

At the June Term, 1866, of the County Court of Henry county, the appellees appeared and objected to the rendition of judgment against certain lands belonging to themselves, and situated in the four towns of Loraine, Yorktown, Phœnix and Atkinson, in said county.

Their objections were overruled in the County Court. Appeals were taken to the Circuit Court, where their objections were sustained.

The cases were brought to this court by appeals.

The objections made in the Circuit Court against the rendition of judgment are as follows:

1. That the board of supervisors of Henry county, at their annual meeting in September, 1865, in equalizing the assessments returned by the several assessors of said county, added to the assessed value of the lands in the town of Loraine one dollar per acre; and added to the assessed value of lands in the township of Yorktown sixty cents per acre; and deducted from the assessed value of the lands in the township of Phœnix twenty-five cents per acre.

2. The town authorities of the town of Atkinson levied a bounty tax of five per cent, which the county clerk extended on the tax books of that year at three per cent. In Yorktown, the town authorities levied a bounty tax of three per cent for each of the years of 1865, 1866 and 1867, by a vote taken at the election held January 2, 1865. The town authorities of the township of Loraine levied a bounty tax of two per cent in 1865, and enough to raise $1,800 in 1866, and $1,400 in 1867.

The appellant introduced in evidence the list of delinquent lands presented by the co unty treasurer, to the County Court of Henry county, June 18, 1866, including the lands to which the objections applied.

The appellees, to maintain their objections to the rendition of judgment for taxes against their respective lands, proved, that the board of supervisors of Henry county, at their annual meeting in September, 1865, in equalizing the assessments returned by the assessors of the several townships, made the following change in the valuation of lands, for the year 1865, to wit: In the township of Loraine, they added to the assessed valuation of lands one dollar per acre; in Yorktown, sixty cents per acre; in the town of Phœnix, they deducted twenty-five cents per acre. That in the town of Yorktown, the bounty tax was three per cent, levied for the years 1865, 1866, 1867, by a vote taken at an election held on the 2d of January, 1865. That in the town of Atkinson, the town authorities levied a bounty tax of five per cent, for the year 1865, which the county clerk extended on the books at three per cent, with the intention of legalizing the same. That in Loraine, the electors levied a bounty tax of two per cent, for 1865, and enough to raise $1,800 in 1866, and $1,400 in 1867, by a vote taken at an election held January 23, 1865, which was all the evidence offered by either party.

Messrs. HINMAN & PAGE, for the appellant.

Mr. GEO. W. SHAW, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

These cases were, originally, applications by the county treasurer to the County Court for judgment against the lands of appellees for delinquent taxes remaining due and unpaid for the year 1865. On the trial in the County Court appellees appeared and resisted the rendition of the judgment. The objections were disallowed, and judgment was rendered against the lands for the taxes, interest and costs. The cases were removed to the Circuit Court by appeal, where a trial was had, and the objections sustained, and a judgment for the sale of the land refused. And, to reverse the judgment of the Circuit

Court, the cases are brought to this court by appeal. Both cases involve the same questions, and will be considered together.

The objections relied upon are, that in the towns of Phœnix, Yorktown and Loraine, the board of supervisors, at their annual meeting, in September, 1865, made changes in the assessed value of real estate in these towns, by adding one dollar per acre to the assessed value in Loraine; in Yorktown, sixty cents per acre, and in Phœnix, by deducting twenty-five cents per acre. Also, that the town authorities levied a bounty tax in the town of Atkinson, of five per cent on the assessed value of the property, and the county clerk extended a tax of but three per cent for that purpose. That the assessment is unequal and exorbitant, as compared with the value placed upon other lands. That the authorities in Yorktown levied a bounty tax of three per cent for the years 1865, 1866 and 1867, by a vote taken at an election held in January, 1865. And in Loraine a tax of two per cent was levied for the year 1865, and a sufficient tax to produce the sum of $1,800 in the year 1866, and $1,400 in 1867.

The first question presented is, whether the board of supervisors conformed to the requirements of the statute in equalizing the assessed value of the lands in these towns, by adding to, or deducting a specific sum from each acre of land in the town. The fifteenth section of the township organization law provides, that the board of supervisors shall, at their annual meeting in September in each year, "examine the assessment rolls of the several towns in their county, for the purpose of ascertaining whether the valuations of one town or district bear just relation to all the towns and districts in the county, and they may increase or diminish the aggregate valuation of real estate, by adding or deducting such sum upon the hundred, as may in their opinion be necessary to produce a just relation between all the valuations of real estate in the county." Sess. Laws of 1861, p. 243.

In framing this provision a word has no doubt been accidentally omitted after the word "hundred." Appellees contend

that in giving it a construction the word "acres" should be supplied, while appellant insists that it should be the word "dollars." We are of the opinion, that it is manifest that it was intended to require the sum to be added to, or taken from each $100 of the assessed value returned by the officer. By our Constitution and revenue laws, the assessment is designed to be based on valuation, thus producing equality of burthen by proportionate rate. The law requires the assessor to assess all property at its true value, and it presumes he has performed his duty as required by the law and his oath. It also designs, that this ratable burthen shall still exist after the equalization has been made. It is manifest, that by adding a certain sum to each acre, or hundred acres, the equality of burthen must be destroyed. Suppose that the assessor has returned property assessed at two-thirds of its value, and one dollar is added to each acre in the town, is it not apparent, that the acre of land valued at ten dollars would be assessed higher, according to its true value, than the acre assessed at thirty dollars.

By such a course the lower grades of land would by that means be assessed higher in proportion to its value than the more valuable lands. But when the same per cent, or sum, is added to each $100 of valuation, the relative proportion in the valuation is preserved, and the design of the law will be carried out, but otherwise it would be defeated. And for the same reason the deduction of a sum from each acre, or hundred acres, would produce similar results. We are of the opinion, that the board of supervisors were not authorized to make the equalization in the mode adopted.

It is conceded, that the town authorities in Atkinson had the power to levy a bounty tax of three per cent, but it is urged, that by exceeding their authority, and in levying five per cent, their action became void. It is a familiar principle, that in the exercise of delegated power, all acts within the scope of the authority will be sustained, where such acts can be separated from those in excess or outside of the power. But, when the acts within the power are so intimately connected with those outside of the power that they cannot be separated, then the

entire action of the agent or officer must fail. If it were conceded that the town could levy but three per cent for the given purpose, and that the additional two per cent was wholly unauthorized, still the levy and collection of the three per cent which was authorized could be enforced, independent of the additional levy of the two per cent. The latter could be rejected, and the former sustained. In extending this tax the clerk adopted this course, and rejected the two per cent as unauthorized, and extended a tax of three per cent, which all concede could be legally levied. It is manifest that it was levied, and because more was levied, it did not vitiate that legal and authorized levy. We perceive no weight in this objection.

It is insisted, that the town authorities had no power to vote a tax for more than one year at the same election. We do not propose to discuss this question, as it does not arise in this case. We are clearly of the opinion, that they had the power to vote the tax for the year of 1865, whether they could that for the two subsequent years or not, and the tax of the first year only is involved. If they exceeded their authority in voting a tax for the two latter years, it could in no wise affect this tax, which they were authorized to vote at their town meetings. When objection shall be made to the enforcement of the taxes voted for 1866, and 1867, it will be proper to pass upon their legality, but not till then.

But did the change in the assessment made by the board of supervisors, render the entire assessment of the real estate in those towns void, or was it only void *pro tanto?* Their action, we have seen, was unauthorized, and, being unauthorized, it could not alter, change or vitiate the legal acts of the assessors of those towns. Until legally changed or vacated, those assessments were binding on the tax payers. And, being so, the Circuit Court should have rendered judgment for the taxes due upon the assessments as made by the town officers. In those towns where the increase was made to the value of the land, a ratable amount of the tax equal to the increased value, should have been deducted from each tax extended on the collector's

books, and a judgment rendered for the balance. And in the town where the deduction was made from the valuation of each acre, the several kinds of taxes should have been increased in proportion to the deduction thus made, and judgment rendered for the true amount thus ascertained. The judgments of the court below in these cases are reversed, and the causes remanded.

Judgments reversed.

SAMUEL HANNA
v.
JONATHAN RATEKIN.

1. TENDER — *when formal not necessary.* Appellee went to appellant's house to pay a note in legal tender notes. Appellant declared, that he would take nothing but gold or silver, — *held,* that appellant waived a formal tender. *Wynkoop* v. *Cowing,* 21 Ill. 588.

2. SPECIFIC PERFORMANCE — *laches — waiver of strict performance.* Where time was not made the essence of a contract, and there was an offer to perform in a few days after maturity, and a refusal to accept any thing but gold or silver, — *held,* that the party whose duty it was to perform was not chargeable with laches, and even if time had been made of the essence of the contract, the refusal waived a strict performance.

3. DECREE — *how impeached.* A decree cannot be impeached by affidavits alone, unaccompanied by a bill filed for that specific purpose.

4. CHANCERY — *affirmative relief.* To entitle a defendant to affirmative relief he must file a cross-bill.

APPEAL from the Circuit Court of Warren county; the Hon. JOHN S. THOMPSON, Judge, presiding.

In the year 1849, Ratekin had a pre-emption right to the land in controversy, except twenty-four acres; not being able to enter it himself, he borrowed $200 from Hanna, and to secure him, entered the same in Hanna's name, giving his note for the amount borrowed, with an agreement to pay fifteen per cent per annum. Ratekin was in possession of the land at the time, and up to March, 1863. The parties had various settlements, in order to *compound the interest.*

In 1854, Hanna lent him a small sum, and paid the taxes on the land. In 1858, Ratekin paid $195 on his indebtedness. In March, 1862, Ratekin conveyed the twenty-four acres to Hanna for $240. Hanna loaned Ratekin $260 more, and they computed the principal and interest (at fifteen per cent), on the former loans to be $1,732.77. Hanna then executed to Ratekin a bond conditioned for the reconveyance of the land in controversy, on payment of $2,232.77 in one year from the date thereof. Ratekin was absent in Oregon when the note became due, but his son, Charles V. Ratekin, and his brothers, Edward and George Ratekin, about the 1st of March, 1863, went to Hanna's house and offered to pay him the whole amount in legal tender notes, which was refused because the tender was not made in gold and silver.

In the spring of 1863, Ratekin's family was driven from the land, by the agents of Hanna.

In July, 1864, Ratekin filed his bill for specific performance, setting up the above facts, and averring his willingness to perform the contract by paying the indebtedness.

Messrs. JAMES W. DAVIDSON and A. G. KIRKPATRICK for the appellant.

Mr. J. H. STEWART, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The record and testimony in this cause are voluminous, and we have given it ample consideration, and from it have reached the conclusion, that the relation of these parties was, originally, that of mortgagor and mortgagee. Whether the written contract of March, 1862, changed that relation, to one of vendor and vendee, is wholly immaterial; for, in the first position, there was a right of redemption, and, in the other, the right of appellee to call upon appellant to perform specifically his contract of that date, as time was not, by the contract, made its essence, and the proof is, that the appellee offered to perform, in a few days after the note matured, hence, he was not chargeable with laches.

As to the question of tender, a formal one was not necessary, as appellant declared he would take nothing but gold or silver. *Wynkoop* v. *Cowing et al.*, 21 Ill. 588. The parol evidence of what occurred at the time the Ratekins went to appellant's house to pay the note in legal tender notes, though inadmissible to establish a new contract, was competent for the purpose of showing that appellant waived a formal tender, and waived strict performance, even if time had been of the essence of the contract.

Appellant refusing, then, to accept any thing but gold and silver in payment, such refusal gave appellee the right at once to bring his bill. The allegations of the bill are substantially proved. We see no error in the refusal of the court to set aside the decree rendered at March Term, 1863. A decree cannot be impeached by affidavits alone, unaccompanied by a bill filed for that specific purpose.

The decree must be affirmed. We are asked by the appellee to modify the decree here, by throwing out the usurious interest, which went to make up the total of the recovery.

This we cannot do, as appellee has filed no cross-bill asking affirmative relief, nor has he assigned any cross error. Under these circumstances, all that this court deems it proper now to do, is to affirm the decree.

Decree affirmed.

LYCURGUS EDGERTON *et al.*

v.

ARCHIBALD YOUNG *et al.*

1. MORTGAGE—*merger*. A mortgagee may procure a conveyance of the mortgaged premises from the mortgagor without necessarily merging the lien of his mortgage in the greater estate.

2. Where a greater and less estate meet in the same person, a merger does not necessarily follow. That will depend upon the intent and the interest of the parties; and if a court perceives it is necessary to the ends of justice, that the two estates should be kept alive, it will so treat them.

3. A mortgagee assigned a note secured by mortgage, and subsequently procured a conveyance in fee of the mortgaged premises from the mortgagor to himself. The land was then levied upon and sold as the property of the mortgagee, to a third party. *Held*, that the only interest acquired by the purchaser at the sale was the equity of redemption.

4. If a purchaser finds upon record a mortgage, and a subsequent deed from the mortgagee to the mortgagor, it is probable that he would be protected under our registry laws against the claim of an assignee of the note secured by the mortgage, in the absence of notice of such assignment.

5. Although the assignment of a note, secured by mortgage, carries with it the equitable interest in the mortgage, it carries only an equitable interest; and, if the assignee desires to protect himself against all peril from a release of the legal title by the mortgagee to the mortgagor, and a subsequent conveyance by the mortgagor to a third person without notice, it would probably be held, that the assignee of the note should also take and record a deed from the mortgagee for the mortgaged premises. But, where the mortgagor conveys to the mortgagee the same rule does not apply.

6. CHANCERY—*cross-bill, when unnecessary.* A cross-bill is unnecessary when a defendant seeks no affirmative relief.

WRIT OF ERROR to the Circuit Court of LaSalle county; the Hon. M. E. HOLLISTER, Judge, presiding.

This was a suit in chancery commenced by Archibald Young, and Elbert H. Van Kleek, the defendants in error, in the Circuit Court of LaSalle county, for the purpose of foreclosing a trust deed, executed by Joshua Cushing and wife to Orville N. Adams, to secure a note for $1,600.

A decree of foreclosure was rendered in the court below, from which a writ of error was prosecuted to this court.

The facts in the case are sufficiently stated in the opinion of the court.

Messrs. WALKER & DEXTER, for the plaintiffs in error.

Messrs. CHARLES BLANCHARD and A. J. GROVER, for the defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 7th of October, 1855, Joshua Cushing executed to Orville N. Adams, his promissory note for $1,600, payable one

year from date, and, to secure its payment, at the same time executed a deed of trust on certain real estate, in which deed Adams was made the trustee with power to sell. On the 19th of May, 1856, Adams, being indebted to Young & Van Kleek, the complainants below, in the sum of $1,828, indorsed in blank the note of Cushing, and delivered it, together with the deed of trust, to the attorneys of Young & Van Kleek, to be held by them as security for the payment of the debt due from Adams to Young & Van Kleek. On the 27th of November, 1856, the note from Cushing to Adams being due and unpaid, the former executed to Adams, at his request, a conveyance in fee simple for the premises described in the deed of trust. It is not claimed that Young & Van Kleek, or their attorneys, had any agency in procuring the execution of this deed, or, at that time, any knowledge of its execution.

Before this time, namely, at the July Term, 1856, of the Circuit Court of the United States, for the Northern District of Illinois, Lycurgus Edgerton, one of the plaintiffs in error, recovered a judgment against Adams on which execution was duly issued, and on the 25th of August, 1857, the premises described in the deed of trust were sold by the marshal, and subsequently conveyed by him to J. M. Walker, as attorney of Edgerton, and afterward conveyed by Walker to Edgerton himself.

The attorneys of Young & Van Kleek, considering the lien of the deed of trust lost by these proceedings, on the 27th of October 1857, procured from Chauncey K. Adams, a brother of Orville N. Adams, a deed conveying to James Strain, one of said attorneys, a quarter section of land situate in Knox county, and, at the same time, Strain gave back to O. N. Adams a contract to reconvey in case Adams should pay Young & Van Kleek the amount due them in eighteen months from that date. The contract provided, that time should be of its essence, and if Adams failed to pay within the time stipulated, the contract to reconvey should be void. Adams did fail to pay, and on the 21st day of May, 1859, Strain, at the request of Young & Van Kleek, and with the consent of Adams, executed to them a deed for the Knox county land.

On the 7th of August, 1865, Young & Van Kleek filed their bill in chancery against Edgerton, Adams and Cushing, praying for a sale of the premises described in the deed of trust. Edgerton and Adams, in their answer, insist upon the sale and deed by the marshal as creating a paramount title, and also set up the proceedings in regard to the Knox county land. The Circuit Court pronounced a decree directing the payment to complainants of the amount due upon the note secured by the deed of trust, and, in default of payment, within thirty days, that the premises described in said deed of trust should be sold. Edgerton sued out a writ of error.

It is insisted by the complainant in error, that, inasmuch as no deed from Adams to Young & Van Kleek for the premises described in the deed of trust was ever made and recorded, nor any instrument placed on record showing the assignment by Adams, and since, when Edgerton bought, the record only showed, first, a deed of trust or mortgage by Cushing to Adams, and then an absolute deed from Cushing, Edgerton had the right to buy upon the faith that the entire estate in the premises had vested in Adams.

If a purchaser finds upon record a mortgage, and a subsequent deed from the mortgagee to the mortgagor, it is probable that he would be protected under our registry laws, against the claim of an assignee of the note secured by the mortgage, in the absence of notice of such assignment. Although the assignment of a note secured by mortgage, carries with it the equitable interest in the mortgage, it carries only an equitable interest, and if the assignee desires to protect himself against all peril from a release of the legal title by the mortgagee to the mortgagor, and a subsequent conveyance by the mortgagor to a third person without notice, it would probably be held, that the assignee of the note should also take, and record, a deed from the mortgagee for the mortgaged premises. But, admitting that such would be the rule where the mortgagee reconveys to the mortgagor, it by no means follows, that the same rule should be applied to cases where the mortgagor conveys to the mortgagee. The conveyance in the former case

can be understood only as manifesting an intention on the part of the mortgagee to release the lien of the mortgage. It can be made for no other purpose. A mortgagor, procuring a release of a lien created by himself against his own land, would be presumed to have procured the release with the express intent to extinguish the lien, and third persons would be authorized to act upon that presumption. But a mortgagee may procure a conveyance from the mortgagor without intending to merge the lien of his mortgage. It may be of great importance to him to be permitted, for the protection of his title, to keep his mortgage alive, and to assert it in a court of equity, if the necessity shall arise. Where a greater and less estate meet in the same person, a merger does not necessarily follow. That will depend upon the intent and the interest of the parties, and if a court perceives it is necessary to the ends of justice that the two estates should be kept alive, it will so treat them. Thus, if a mortgage is the eldest lien, and is for an amount exceeding the value of the premises, and the mortgagee, to avoid the expense of foreclosure, takes a conveyance from the mortgagor, a court of equity would not permit the mortgaged premises to be swept away from him by a junior judgment creditor without payment of the mortgage, under the pretense that its lien had been lost by merger. *Campbell* v. *Carter*, 14 Ill. 289; *Jarvis* v. *Frink*, 14 id. 398; *Brown* v. *Blydenburg*, 3 Seld. 141; *Gillett* v. *Campbell*, 1 Denio, 520.

When, then, in the case before us, Edgerton found on record the deed from Cushing, occupying the position of mortgagor, to Adams holding the place of mortgagee, he had no right to assume, that it was the intention of the parties thereby to extinguish the mortgage. This would not have necessarily followed, even if Adams had not previously assigned the note. In purchasing the land, Edgerton acted at his peril so far as related to the mortgage. He knew, that, by his purchase, he would acquire the estate conveyed by the absolute deed from Cushing to Adams, to wit, the equity of redemption; but he also knew, or was bound to know, that the mere circumstance that by the record, the estates of the mortgagor and mortgagee had united

in the same person, did not necessarily destroy the lien of the mortgage. He knew, or must be presumed to have known, that the mortgage would be held to have merged or not have merged as equity should require, and that if, when the mortgagor conveyed to the mortgagee, the latter had sold the note secured by the mortgage, then equity would require the mortgage to be kept alive, and he would acquire by his purchase only the estate of the mortgagor. There was nothing to justify him in acting on the presumption that the mortgage had been paid, and as the note had been assigned to Young & Van Kleek, it would be clearly inequitable to apply the doctrine of merger for the purpose of destroying the mortgage.

While, however, the Circuit Court committed no error in holding the mortgage still in force, it did err in directing its full amount to be paid without reference to the value of the Knox county land. The taking of this land did not release the mortgage as urged by complainant in error. It was merely taken as new security, and although taken because of an impression that the lien of the mortgage had been lost, yet the mortgage was not in fact released, nor was there any intention to voluntarily release it. But although the conveyance of the Knox county land did not of itself release the mortgage, yet it did operate as a payment, to the extent of its value, upon the debt due from Adams to Young & Van Kleek, and should have been so applied, and the residue of said debt should have been paid from the proceeds of the Cushing mortgage. As the record now stands, the court has pronounced a decree which, as appears from the pleadings and proofs, may give the complainants below much more than they are entitled to receive. It is suggested by counsel for appellees, that this inquiry could not be made without a cross-bill. If the complainants held, in the Knox county land, only the estate of a mortgagee, a cross-bill would be necessary in order to compel them first to exhaust that security. But the title of the complainants to that land has become absolute. The contract to reconvey was what is commonly known as a forfeit contract, in which time was expressly made of the essence; and, Adams having failed to

redeem within the stipulated time, and having consented to the conveyance by Strain to the complainants, their title may well be considered absolute. Indeed, by his answer in this suit, Adams sets up their title as having become absolute, and claims that the debt has thereby been satisfied. This is an abandonment of all claim of right to redeem. A cross-bill was therefore unnecessary, as the defendants ask no affirmative relief, but simply that a piece of property received by complainants on their debt should be applied as a payment *pro tanto*. This equity demands, and the court below will ascertain the value of this land at the time of the conveyance by Strain to complainants, including in the inquiry the condition of the title, and will first apply that amount on the indebtedness from Adams to complainants, and decree the payment of the residue out of the proceeds of the sale under the Cushing mortgage.

The counsel for appellants have insisted, that the deed from Strain to complainants operated like a strict forclosure, and that the effect of such a forclosure is to discharge the entire debt. The equitable rule, however, and the one sustained by the weight of authority, is, that such a foreclosure is only a discharge of the debt *pro tanto*.

The decree must be reversed and the cause remanded.

Decree reversed.

WESLEY MISNER *et al.*

v.

J. MURRAY BULLARD.

1. CONSTITUTION—*valid laws under.* A law authorizing the levy of a town tax to raise a fund to procure volunteers and substitutes for the United States army, to exempt the town from a draft, is constitutional. The case of *Taylor* v. *Thompson*, 42 Ill. 9, approved.

2. TOWNS—*what is a town fund. Held*, that a tax raised for such an object is for a town purpose, and might be audited as such. It is for a corporate purpose when specially authorized by law. But, in the absence of such authority, such a tax is not warranted. The case of *Drake* v. *Phillips*, 40 Ill. 388, considered and approved.

Statement of the case.

3. BOUNTY FUND—*law authorizing.* The act of the 18th of January, 1865, authorizes the boards of supervisors in the several counties therein named, to levy at their regular sessions, a special tax not exceeding three per cent, as they deem necessary, to discharge any part or all indebtedness then incurred, or which they might afterward incur, on account of any appropriation which had been or might be made to pay bounties to volunteers, substitutes or drafted men, who had been or might be mustered into the service.

4. The second section confers the power to prescribe the time when such special tax shall be collected. The third confers authority to levy and cause to be collected such special tax, on any town or towns, as may be necessary to pay bounties to relieve them of indebtedness for bounties paid by the town or individuals to volunteers who had or might enlist and be credited to the town.

5. The fifth section declares, that before such tax shall be levied to pay indebtedness named in the third section, persons holding such indetedness are required to submit their claims to the town auditors for liquidation and allowance, the town clerk shall, when allowed, certify the same to the county clerk, stating the action of the board of auditors, which is required to be filed within four days from the time the auditors make their decision. *Held,* that the power conferred by this act was ample to authorize the board of supervisors of Kendall county to levy this tax, and when levied, it is for a corporate purpose. The Constitution authorizes a corporate tax to be levied, but has not specified what are corporate purposes, leaving that to be otherwise determined.

6. The act authorizes the board of supervisors to levy the tax, but requires as preliminary thereto, that the town auditors must first pass upon the claims for money advanced to procure volunteers. Until such claim has been so acted upon the board have no power to make the levy.

7. TAX—*levied for town purposes.* Where the board of town auditors have acted upon and allowed such claims, and they were properly certified to the county clerk, the board of supervisors were required to levy the tax on the property in the town, and it was valid without reference to the election to vote the tax, it not having been required by the statute.

8. INJUNCTION—*dissolution of—damages.* On the dissolution of an injunction, where a suggestion of damages shall be filed, the statute requires the court to assess the damages,—*held,* that it is not error to allow a counsel fee in such assessment.

WRIT OF ERROR to the Circuit Court of Kendall county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a suit in chancery in the Circuit Court of Kendall county, brought by Wesley Misner, De Marquis Misner, John Boyd, Jacob Austin, Fletcher Misner, James Evans, Aaron Petty, Kingsley Martin, Henry E. Miers, Elisha Taylor,

Samuel Jackson, William Evans, Eben Waters, Lewis Grover, William Whitfield and Stephen Drake, against J. Murray Bullard, town collector of the town of Fox, to enjoin the collection of a bounty tax levied on the taxable property of the town.

A summons was issued on the 23d of January, 1866, which was afterward returned served. A temporary injunction was also granted restraining the collection of the tax until the further order of the court. Bullard answered the bill, and a replication was filed to his answer.

The cause came on to a hearing at the May Special Term, 1866, and the court rendered a decree dissolving the injunction. And upon suggestion of damages being filed by defendant, after hearing evidence, the court assessed the same at $100 for liability incurred for solicitor's fees. Complainants prosecuted this writ of error to reverse the decree of the court below.

The facts of the case sufficiently appear in the opinion of the court.

Mr. T. LYLE DICKEY, for the plaintiffs in error.

Mr. R. G. MONTONY, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was a bill filed by a number of tax payers of the town of Fox, in the county of Kendall, to restrain the collection of a special town tax, levied for the purpose of paying bounties to volunteers to fill the quota of the town, and thereby escape the draft. It appears from the allegations of the bill, that on the 23d of January, 1865, the town clerk gave notice that a special town meeting would be held on the 3d day of the ensuing February, "to vote for or against a loan, to be levied by a tax, to procure bounty for volunteers, to fill our quota under the President's last call for three hundred thousand men." At

the time specified, the polls were opened to vote, "for or against a tax, to be levied on the town, for the purpose of raising a bounty, to be paid to men who enlist to fill the quota of the town, under the President's last call for three hundred thousand men." The election resulted in fifty-eight votes in favor of, and four against the tax.

On the 24th day of January, 1865 (the day after the notice was given), divers citizens of the town signed a subscription paper, by which they agreed to pay the sums of money set opposite their several names, as a loan to the town, to be paid to volunteers, to fill the quota of the town under the call for men.

That some time subsequent to the 16th of February, 1865, the board of auditors certified, that they had examined the subscription or account of loans, and found it correct, and ordered that a tax of three per cent be assessed upon all of the taxable property of the town for the year 1865, to pay the debt, which was filed in the office of the town clerk. The entries in the town record recite, as a part of the auditing of the town, that there is due to individuals of the town $7,900, loaned and paid out as a bounty to volunteers in January, 1865, and that the auditors voted to levy a tax of three per cent on all the taxable property in the town toward raising the amount.

On the 7th of September, 1865, the town clerk filed with the county clerk a certificate, that the auditors had voted to levy the tax, and the board of supervisors of the county at their September meeting, ordered the county clerk to extend the same on the collector's book, which he did. A warrant was issued embracing this tax, in a separate column, which was placed in the hands of J. Murray Bullard, the town collector, who was about to proceed to its collection when this bill was filed.

It is, among other things, alleged in the bill, that none of complainants were liable to a draft, most of them being over forty-five years of age at the time the vote was taken. That two of them had served in the war of 1812, and were honorably discharged. That one of them had enlisted in 1862, and had

served three years in the army; had accompanied Sherman in his march to the sea; had been twice wounded in battle, and honorably discharged. An answer was filed which admitted the allegations of the bill; and alleges, that the money thus borrowed by the town, had been faithfully applied to the payment of bounties to volunteers.

The cause came on for a hearing in the court below, at the May Term, 1866, when the court on motion of defendant dissolved the injunction. The defendant thereupon filed suggestions of damages sustained by reason of the wrongful suing out of the injunction.

After hearing evidence, the court found, that he had sustained damage to the amount of $100 paid, or to be paid, as a solicitor's fee, in defending the suit; and ordered a decree for its payment. The case is brought to this court to reverse the decree of the court below.

It is urged, as ground of reversal, that this law is unconstitutional, and therefore unauthorized and void, and that its collection should have been enjoined. In the case of *Taylor* v. *Thompson*, 42 Ill. 9, this question was presented, and after full argument and mature consideration, a similar law was held to be constitutional. Other cases have since arisen, and the question has been regarded as settled. And in this case, sufficient reasons have not been presented to induce us to depart from the decisions then announced.

It is also objected, that the town auditors had no authority to audit and allow this claim against the town. The first reason urged is, that it was not for a town purpose. In the case of *Taylor* v. *Thompson*, it was held, that a tax to raise a fund to pay bounties for volunteers, to avoid the draft by a county, was a tax for a corporate purpose, when specially authorized by law. The same doctrine was announced in the case of *Briscoe* v. *Allison*, *ante*, p. 291. In the case of *Drake* v. *Phillips*, 40 Ill. 388, it was held, that in the absence of express authority from the legislature, a town had no power to levy a tax to refund money to persons who had paid bounties to procure substitutes to avoid the draft.

It was there held, that such a tax was not for a town purpose, and was unauthorized. If in this case such a tax was levied, it was unwarranted. But, it is claimed, that this tax is authorized by the act of the 18th of January 1865. (See Private Laws, p. 101.) This law names, and is applicable in its provisions, to Kendall and other counties. Its provisions are broad and comprehensive, and were evidently designed to embrace a large class of cases, and to confer large powers on the boards of supervisors of the counties embraced in its provisions. The first section declares, that the board of supervisors of the several counties named in the act, may, at any regular or special session, levy such special tax, not exceeding three per cent annually, on the taxable property of their county, as may, in their judgment, be necessary to discharge any part or all indebtedness then incurred, or which by the board might thereafter be incurred, on account of any appropriation which had been or might be made for the payment of bounties to volunteers or drafted men, who had been, or might be, mustered into the service.

The second section confers the power upon the several boards of supervisors to prescribe the time when any such special tax shall be collected and paid. The third section confers the power upon such boards, in the counties named, to levy and cause to be collected such special tax upon the taxable property of such town or towns, as may be necessary to pay or discharge any indebtedness incurred by such town or person on account of local bounties paid or agreed to be paid by such town, or towns, or persons, to volunteers who have or might thereafter enlist and be mustered into the service and be credited to the town. The fourth section relates only to the mode of collecting the tax. The fifth section declares, that before such tax shall be levied to pay indebtedness to any person or persons as mentioned in the third section, such person or persons are required to submit to the board of town auditors their claims for liquidation and allowance, and a certificate of the clerk of the town is required to be filed with the county clerk, stating the action of the board of auditors in respect of their

approving or disapproving such claims, which is required to be filed within five days from the time the auditors shall make their decision. These seem to be the only provisions of this act which are applicable to the case under consideration.

The power here conferred was ample to authorize the board of supervisors of Kendall county, to levy this tax, if the prerequisite steps were observed. The Constitution not prohibiting the legislature from authorizing the levy of such a tax, and as, when levied, it became a tax for corporate purposes, the only question is, whether the legislature exceeded their power in prescribing the mode of levying the tax, and whether this tax was levied in the manner prescribed.

The Constitution authorizes the levy of a tax for corporate purposes, but fails to indicate the body, or persons who shall make the levy; that is left to be determined by the general assembly. In this case in the exercise of the power, they have authorized the board of supervisors ultimately to make the levy. But as a preparatory step to authorize them to act, the claim for money advanced to procure volunteers, must be presented to, and audited by the board of town auditors.

Until the claim has been presented, and allowed in the manner prescribed, they have no power to order the levy of the tax, and when the allowance is made by the town auditors, the fact must be certified as required, to the board of supervisors.

In this case the auditors acted, and allowed the claims. They were certified and filed with the county clerk as required by the law, and this not only authorized, but it required, the board of supervisors to make the levy, as they did. The act does not require that there should be a vote of the citizens of the town for or against the tax, or the rate which should be imposed. The holding of the election was simply useless and unnecessary.

We do not perceive any want of power to make the levy, or any irregularity in exercising the power.

It was objected, that the court erred in decreeing the payment of $100, by complainants to defendant, as damages for the wrongful suing out of the injunction. This was done on suggestions filed in pursuance of the statute. But it is urged, that

attorney's fees cannot be allowed. In the case of *Ryan* v. *Anderson*, 25 Ill. 372, the court held, that costs, including counsel fees, might be allowed as damages, on the dissolution of an injunction.

It is true, that in that case the suit was on an injunction bond, but the principle is the same, and that case must govern this question.

We perceive no error in this record for which the decree of the court below should be reversed, and therefore it must be affirmed.

Decree affirmed.

THEODORE HILL
v.
ELMER D. BACON.

1. HOMESTEAD — *to what it extends.* Under our statute, the lot of ground and buildings owned and occupied by the debtor and his family, to the value of $1,000 is exempt from levy and forced sale. The court will take judicial notice, that a quarter section of land is made up of four forties, each with well defined bounds. This being so, it is competent to inquire the value of the forty so occupied, and if it does not exceed $1,000, the same is exempt, unless released in the mode prescribed by the statute. To refuse such inquiry is error.

2. ACKNOWLEDGMENT — *conclusiveness of certificate.* Where the certificate of acknowledgment appears substantially in the form prescribed by the statute it is conclusive, and can only be impeached for fraud or imposition practiced.

3. NOTARY PUBLIC — *extent of power.* Under the law providing for notaries public, although they are appointed in towns and cities, yet they are county officers, and are not confined in their action to the particular town in which they reside. The acknowledgment of a deed being a mere ministerial act may be taken by a notary public anywhere within the limits of the county.

APPEAL from the Circuit Court of De Kalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Mr. R. L. DIVINE, for the appellant.

Mr. CHARLES KELLUM, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Three questions are presented by this record: First, did the homestead right extend to the entire quarter section of land? Second, can the certificate of acknowledgment of a deed by a magistrate be impeached by parol? And, third, could the notary public, who officiated in this case, take an acknowledgment of a deed at any place in the county in which he resides?

The answer to each of these questions must be in the negative, except the last.

As to the first, the homestead act cannot be misunderstood in its provisions. The language is plain and unmistakable: There shall be exempt from levy and forced sale the lot of ground and the buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000, and no release or waiver of such exemption shall be valid unless the same shall be in writing, etc.

It is in proof, that the lot on which the improvements were, and occupied by the defendant, was the south-east forty of this quarter section. The court will know judicially, that a quarter section of land is made up of four forties, each with well defined bounds. This being so, it was competent to inquire, what was the value of the forty so occupied, and if it did not exceed the value of $1,000, the land was exempt, and if not released in the mode prescribed by the statute, remained the homestead against which the deed of defendant was inoperative. There was error in refusing this testimony.

Upon the second question, this court has already expressed an opinion, after much reflection, that when the certificate of acknowledgment appears substantially in the form prescribed by the statute, such certificate is conclusive, and can only be impeached for fraud or imposition practiced. *Graham* v. *Anderson*, 42 Ill. 514.

On the last point, we understand the law providing for the appointment of notaries public to be, that although they are appointed in towns and cities, yet they are county officers, and they are not confined in their action to the particular town in which they may reside. Justices of the peace are elected for particular districts, yet it has never been doubted that they were county officers, whose jurisdiction was co-extensive with the limits of the county.

This act of taking an acknowledgment of a deed, is a mere ministerial act, and can be taken by a notary public anywhere within the limits of the county.

The court having ruled out the testimony offered, as to the value of the lot on which the homestead was, and having permitted evidence to contradict the certificate of the officer taking the acknowledgment, and having refused to instruct, that the power of the notary extended throughout the county of his residence, as to taking acknowledgments of deeds, and for these errors the judgment must be reversed.

But, as we hold, that the acknowledgment of the quitclaim deed was properly certified, and as it contains a formal and proper waiver of the homestead, the plaintiff was entitled to recover the entire quarter section, and such should have been the verdict. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY

v.

RUSSELL B. FOSTER, who sues as well for himself as for the People of the State of Illinois.

1. RAILROAD—*liability of, for failure to whistle or ring bell.* Under our statute imposing a penalty of fifty dollars on railways for failure to sound a whistle or ring a bell for eighty rods before arriving at a crossing, the action may be brought either by the prosecuting attorney in the name of the people, or *qui tam* by an *informer*.

2. DEGREE OF PROOF REQUIRED IN SUCH CASES. In an action *qui tam* in such a case, it is error to instruct the jury, for the plaintiff, "that a preponderance of evidence, only, is required, and that it is not necessary a jury should be satisfied of the guilt of the defendant beyond a reasonable doubt." While the same completeness of proof is not required in such cases, as in cases where life or liberty is in jeopardy, yet there must be a reasonable and well founded belief of the guilt of the defendant,—a very slight preponderance will not suffice.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. BRYAN & COCHRAN, for the appellant.

Messrs. FLEMING, PILLSBURY & PLUMB, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was a *qui tam* action brought by Foster to recover the penalty of fifty dollars imposed upon railways, for a failure to sound a whistle or ring a bell for eighty rods before arriving at a crossing. There was a recovery in the Circuit Court, and the defendant appealed.

It is first urged for the appellant, that the suit should have been brought in the name of the people. It is true, as counsel suggest, that the 42d section of the act authorizes suit to be brought by the prosecuting attorney in the name of the people,

for the recovery of all penalties imposed by the act, and the penalties when thus recovered, would go exclusively to the benefit of the State. But the 38th section, which imposes this particular penalty, provides that one-half shall go to the informer, and the other half to the State. It follows, that the action for this penalty may be prosecuted in either form. See *Higbee* v. *The People*, 4 Scam. 165, and *G. & C. U. R. R. Co.* v. *Appleby*, 28 Ill. 283. In the last case, the court say nothing on this question in the opinion, but the objection was expressly taken by counsel in a suit brought under this same statute, and the judgment of the court below in favor of the plaintiff was affirmed. See also *C. & A. R. R.* v. *Howard*, 38 Ill. 414.

It is also urged, that the court erred in instructing the jury, that a preponderance of evidence, only, was required, and that it was not necessary a jury should be satisfied of the guilt of the defendant beyond a reasonable doubt. This instruction was erroneous. While the law does not require the same completeness of proof in cases of this character, that is required in criminal prosecutions where life or liberty is in jeopardy, yet the evidence must be of such a character, as to bring home to the jury a reasonable and well founded belief of the guilt of the defendant. Neither a railway company nor a private individual should be subjected to a fine, whereby their property is to be divested, merely because there is a little more evidence that they did not perform some required act, than there is that they did. To allow a jury to enter upon this nice balancing of probabilities in cases of this character, would be to open wide a dangerous door. Before a jury render a verdict taking away a person's property under the form of a fine, they should be satisfied the law has been violated, and if the evidence fails to produce upon their minds, that degree of conviction upon which they would be willing to act in important affairs of their own, it is not sufficient, even though there may be a very slight preponderance. For the error in this instruction the judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the case.

THOMAS BALL
v.
PHILLIP F. W. PECK.

1. LEASE — *mere loose explanation and statements do not create.* Where a landlord says to the wife of his tenant holding over, that he did not wish him to leave the premises, and that he would not disturb the tenant until a lessee of the property, after the expiration of the former lease, should disturb the landlord, *held*, that this does not constitute a new lease to the tenant holding over.

2. FORCIBLE DETAINER — *notice to quit.* A notice to quit should be signed by the landlord or a properly authorized agent, to be binding on the tenant. To authorize a recovery in forcible detainer this must be proved. And the notice to quit must be proved by legitimate evidence. This cannot be done by producing a copy, with an affidavit of service. The witness serving it should be produced to prove the service.

3. Whether the original notice be left with the tenant, or only a true copy or a duplicate, the service must be proved by a witness. The statute has not authorized an individual to make a return of service.

4. The notice required by the third section of the act of 1865, relates to the notice terminating a lease, under the second section of that act. The seventh section of that act only dispenses with a notice of the termination of a lease, which fixes the time when it shall expire; it requires, on the contrary, that a notice be given when he elects to terminate it for a breach of covenants.

5. This section of the act of 1865, does not conflict with or repeal the first section of the forcible entry and detainer act of 1845, which requires a demand in writing to be made for possession before forcible detainer can be maintained. It leaves the demand to be made as required by the act of 1845.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Phillip F. W. Peck brought an action of forcible detainer against Thomas Ball, before a justice of the peace of Cook county, on the 8th day of June, 1865, to recover possession of a house in the city of Chicago. The complaint states, that Peck leased to Ball on the 1st day of May, 1864, for the term of one year; that the term had expired, and that Ball willfully held over after the determination of the time for which it was leased,

and after a demand for possession made in writing. A summons was issued, and a trial was had before the justice of the peace, resulting in a judgment in favor of Ball.

An appeal was prosecuted from this judgment to the Cook Circuit Court. At the September Term, 1865, the cause was tried by a jury, who found a verdict in favor of Peck. Defendant entered a motion for a new trial, which was overruled by the court, and a judgment was rendered on the verdict. He brings the case to this court by appeal and asks a reversal.

James Long testified in the court below, that he was Peck's agent; that he signed the lease to Ball as such agent; that before it expired, he offered to lease the premises to him for another year, but he on more than one occasion refused to lease the property; that witness then leased the premises to Chadwick; that he signed Peck's name to the lease by authority; that he leased to Chadwick in April; that defendant held over.

Plaintiff then offered in evidence the copy of a notice with affidavit of service attached. It was objected to on the grounds, that it was not signed by plaintiff, and because the notice offered was a copy, and also because no foundation had been laid for the introduction of a copy. The objection was overruled, the paper was read in evidence, and exceptions were duly taken.

Defendant called a witness who stated, that he was present at a conversation between Mrs. Ball and plaintiff, in which he said he had intended Ball to keep the property, and that he did not desire Chadwick for a tenant, and that Long should not have leased to him; but he would not disturb defendant unless Chadwick should disturb him. Defendant asked several instructions, the third of which the court refused to give; it is this:

"If the jury believe from the evidence, that the plaintiff, P. F. W. Peck, after the termination of the lease introduced in evidence, told the defendant, or any one acting for the defendant, that he did not want the defendant to leave the premises in question, and that he should not disturb defendant until Chadwick disturbed him, then the plaintiff cannot recover,

without proving that Chadwick had interfered with or disturbed him."

To the refusal of the court to give this instruction defendant excepted, and now urges a reversal on that ground.

Messrs. MONROE, MCKINNON & TEWKSBERRY, for the plaintiff in error.

Messrs. HOYNE, HORTON & HOYNE, for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action of forcible detainer for the recovery of the possession of a house and lot, brought before a justice of the peace, and removed to the Circuit Court, by appeal, and thence to this court. On the trial below it appeared in evidence, that plaintiff in error, on the 1st of May, 1864, leased of defendant in error the house and lot in controversy, for the term of one year. Plaintiff in error had for several years been his tenant. Before the expiration of the term, however, Long, the agent of defendant in error, leased the premises to one Chadwick, for the ensuing year.

On the 1st day of May, Long served a notice on plaintiff in error to quit the possession of the premises. His wife, after the suit was commenced, went to defendant in error and had an interview with him in reference to the property.

He, it seems, assured her, that he had never intended for plaintiff in error to leave the premises until it became necessary to remove the building for the purpose of erecting a new one; that Long had done wrong in renting the premises to Chadwick, as it was contrary to his wishes, and it was not his wish that Chadwick should have them; that he would not trouble plaintiff in error until Chadwick troubled him, for possession; that he wanted the keys turned over to himself and not to Chadwick, as there were other considerations he wanted settled before Chadwick got them.

He further stated, that plaintiff in error had been a good tenant, and he never felt inclined for him to leave, until he

intended building, and then the house would have to be moved off, even if it sold for fifty dollars; that he expected Chadwick would sue him for damages, and he thought the greatest damage would be to let him have the property, as it was not worth the rent he was to pay him for it. He further stated, that he had previously told Mrs. Ball, that if the place was rented for $800, he would be perfectly willing to give plaintiff in error a lease for nothing, and he found he was right, for it was rented for not over $750. "He also stated, that plaintiff in error could have the place so long as Chadwick did not trouble him; he did not wish for Chadwick to take the place; he had read too much in the papers to have him for a tenant." Plaintiff in error asked the court to instruct the jury, that if they believed, that defendant in error told plaintiff in error, that he did not wish him to leave the premises, and that he would not disturb him, until Chadwick disturbed defendant in error, then he could not recover until Chadwick had interfered with or disturbed him. The court below refused to give the instruction, which is urged as a ground of reversal.

The propriety of the refusal to give this instruction, depends upon whether the conversation defendant in error had with Mrs. Ball, could be construed into a lease. It seems no more than his mere declaration as to what he had previously intended, and regret that his agent had not rented the property to plaintiff in error. He did not say, that plaintiff in error could occupy it for any definite period, for any fixed sum, nor were any terms named, only he could occupy it if Chadwick did not disturb him; but he expected he would sue him for damages. There was no consideration paid, even if it could be construed into a contract. It, however, when taken together, only seems to have been an explanation; and an effort on the part of the defendant in error to justify himself in what had been done, and not an intention on his part to create a new term or to extend the old one. Again, he directed her to return the keys of the house to him, which clearly manifested an intention for plaintiff in error to lease, and for Chadwick to go into possession. This conversation is

entirely too loose and indefinite, from which to infer a contract for any purpose, or a lease of the premises.

On the trial below, the written demand for possession was read in evidence, against the objections of plaintiff in error. It was objected specifically, that it was not proved that defendant in error had signed the original demand, or authorized it to be done; that the paper offered was only a copy, and that the proper foundation was not laid for the introduction of a copy. The statute has required, that a demand for possession shall be in writing, before the action is commenced. This demand being essential, it should be proved, to authorize a recovery, and in doing so, the rules of evidence must be observed. It is essential, that the demand should be shown to be genuine, either signed by the person entitled to possession, or some one authorized by him, or at least, recognized by him. Again, the service of the notice of the demand should be proved by legitimate testimony, and according to the rules of evidence. Was this done in the present case?

There is no evidence that defendant in error signed the notice, nor does it appear that Long, his agent, signed his name, nor is there any evidence, that either defendant in error or his agent ever saw the notice which was served. But the question arises, if this is proved to be a true copy, whether the subsequent acts of defendant in error did not amount to an adoption of this notice as his act, although not genuine. We are inclined to think it did, but such ratification could only bind or operate upon plaintiff in error, from the time it was ratified, and he had notice of the fact. He was not bound to regard an unauthorized notice. If the name of defendant in error was unauthorized when the service took place, it was not his act, and plaintiff in error was not bound to regard it. If unauthorized, there was not, when the copy was served, a demand for possession, and there is no evidence that this was recognized as genuine prior to the commencement of the suit, and in the absence of such proof the suit was unauthorized. No doubt the production of the notice on the trial, was a recog-

nition of its genuineness, but that was subsequent to the suing out of process.

Again, whether it be necessary to leave the original, or show the original to the occupant, and serve him with a copy, or whether the two papers are duplicates, each signed by the person making the demand, and one is served and the other retained, still the fact of service must be proved. And that is a fact which must be established in the usual mode of making proof, clearly, according to the rules of evidence. The witness making the service should be called. Officers, only, are authorized to make return of service of process, unless it be in a few cases where the law has authorized private individuals to make a sworn return; and there is no express provision of the law, authorizing a return to be made in this case, either by an officer or a private individual. It then follows, that the affidavit of service in this case was not legitimate proof of the service of the notice, which must be proved to entitle a party to recover in this form of action. The person who served the notice should have been called to prove the fact.

The third section of the act of 1865, obviously relates alone to the service of notice in the single case of terminating a lease for the non-performance of its conditions, as it authorizes the landlord to do in section two of that act. It does not apply to the mode of serving notice of the demand for possession in other cases.

It is insisted, however, that the seventh section of the act of 1865 (p. 109) dispenses with a demand of possession, before bringing forcible detainer. That section declares, that in all cases where a lease or contract exists between the landlord and tenant, where all of its covenants are fulfilled, the lease or contract shall be deemed sufficient notice of its termination for the time for which it was made, and no other notice is necessary. The obvious meaning of this provision is, that where, by the terms of the lease or contract under which the tenant has entered, a time is fixed for it to expire, the lease or contract shall be held to afford him all the notice the law requires; that his lease terminates at that time; that the landlord shall not

be required to give the tenant notice of the time when it expires. It would seem to imply, on the contrary, that where the covenants are not fulfilled, and the landlord elects to enter for a covenant broken, he should give notice, that he has elected to terminate the lease, and to re-enter; and was designed not to conflict with sections two and three of the act.

We do not understand that this provision in any way conflicts with, or repeals the provision of the first section of the forcible entry and detainer act of 1845, which requires a demand in writing to be made before commencing the action. A notice to terminate a tenancy from year to year, at will, or from month to month, requires timely notice before the end of the period, to be given, notifying the tenant that the landlord elects to terminate the tenancy, and the time when it will expire. But this is altogether different from the notice to quit, and the demand of possession required by the first section of the forcible entry and detainer law. And the seventh section only intended to dispense with notice, when the lease had expired by force of its own terms; that the term would end at the stipulated time, still leaving a demand in writing necessary for the possession before the suit could be brought.

For the errors indicated the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

James McKindley *et al.*

v.

Maria Buck *et al.*

1. Practice—*power of court over records after expiration of term.* After a term of the Circuit Court has expired no discretion or authority remains with that court to set aside a judgment. The court may amend it in a mere matter of form, upon due notice to the opposite party. *Cook* v *Wood,* 24 Ill. 295.

2. Writ of error *coram nobis.* This writ has never been in use in this State, and it has fallen into desuetude even in England. Its place is supplied by motion in the court where, and during the term when, the error in fact occurs.

Brief for the Appellants. Brief for the Appellees.

Writ of Error to the Superior Court of Chicago; the Hon. Joseph E. Gary, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. D. C. & I. J. Nicholes, for the plaintiffs in error, cited the following:

The Superior Court erred in setting aside the judgment after the term had expired at which such judgment was rendered. *Cook* v. *Wood et al.*, 24 Ill. 295.

Proceedings by writ of error *coram nobis* have been superseded by the more summary mode of a direct application to the court by motion. *Pricket's Heirs* v. *Legerwood*, 7 Peters, 144; *Sloo* v. *State Bank of Illinois*, 1 Scam. 436.

A judgment might legally have been rendered against Maria Buck, although she was a married woman, if the evidence warranted it. *Emerson* v. *Clayton*, 32 Ill. 494.

The special demurrer should have been sustained. The assignment of errors states no time or place of marriage. The time of every traversable fact must be stated. Gould's Pleadings, p. 87, § 63; p. 110, § 102; Comyn's Digest, pleader C, 119, 120.

Messrs. Hurd, Booth & Kreamer, for the defendants in error, cited the following:

Affidavits copied into the record are no part of the record. *Farnsworth* v. *Agnew*, 27 Ill. 44; *Schlump* v. *Reidersdorf*, 28 id. 68.

A motion by Mrs. Buck would not conclude her husband, who is a party to the writ of error. 2 Tidd's Practice, 1135.

The rule, that the court in which the judgment is rendered, cannot set aside after the term at which it is rendered, does not apply to writs *coram nobis*.

The court in which the "*error in fact*" has occurred is the only court in which it can be corrected. *Beaubien* v. *Hamilton*, 3 Scam. 213; *Peak* v. *Shasted*, 21 Ill. 137; 3 Burrill's Practice, p. 151, §§ 1008, 1009, 767, 768, 769.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This court decided in 1860, after much consideration, that a term of the Circuit Court having expired, no discretion or authority remained with that court to set aside a judgment. It might amend it in mere matter of form, after notice to the opposite party. *Cook* v. *Wood et al.*, 24 Ill. 295. This decision has been adhered to, and will continue to be. This writ of error *coram nobis*, issued by the Superior Court of Chicago, has very much the appearance of an attempt to avoid this decision, but it cannot succeed.

This old writ has never been in use in this State, and it has fallen into desuetude even in England. Its place is most effectually supplied by the more summary proceeding by motion in the court where the error in fact occurred. In this very case, the defendants in error here, one of them, Maria Buck, entered her motion, at the term at which her default was entered, to set the default aside, and read her own affidavit and one made by her counsel, in support of her motion, which the court denied, and to which she excepted. Resort is then had, after the term was ended, to this obsolete writ, to effect that which, at the term, the court committing the alleged error, refused.

Counsel for defendants in error say, that these affidavits cannot be used here, as they are not in the record by bill of exceptions. Nor should they be. They appear in the record as a part of the history of the case, as made by the defendant Maria Buck, and follow immediately after the judgment by default taken against her, and they contain the facts, on which she then sought to set aside the default, and are the same, substantially, as alleged in the petition to the Superior Court for this writ of error. The court, on a full hearing of the motion, on her own proofs, refused to allow it. It was her business, as she excepted to the ruling of the court, to have embodied her proofs in a bill of exceptions, and thus brought the question before this court. A party cannot be indulged in a resort to different remedies where one properly adopted has failed of suc-

cess on its merits. It would be introducing a dangerous practice, should it be tolerated, and protract litigation to an indefinite extent.

If the defendant Maria Buck, could show a valid excuse for failing to set up her defense in the original suit, and that the judgment was inequitable, a court of chancery would interfere to relieve her. Such a mode of proceeding will best subserve the public interests, and best preserve the rights of all parties. The judgment on the writ of error *coram nobis* is reversed, and the writ quashed.

Judgment reversed.

ROBERT P. BRECKENRIDGE
v.
CYRUS H. MCCORMICK *et al.*

INJUNCTION — *amount necessary to jurisdiction.* Under our statute, courts will not entertain jurisdiction or grant an injunction to restrain the collection of a judgment, where the amount in controversy is less than twenty dollars.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Messrs. FLEMING, PILLSBURY & PLUMB, for the appellant.

Mr. L. E. PAYSON, for the appellees.

Per CURIAM: The only question presented by this record is, whether a court of chancery will entertain jurisdiction of a bill to enjoin the collection of a less sum than twenty dollars, which a constable was proceeding to collect upon an execution issued by a justice, as the balance due upon a judgment. It is urged in support of the bill, that it does not fall within the provisions of the 8th section of the chapter of injunctions, because the judgment was originally for more than twenty dollars. However

that may be, it clearly does fall within the 29th section of the chapter of the Revised Statutes, entitled "Courts," which gives jurisdiction to the Circuit Court over all matters in common law and chancery, where the debt or demand does not exceed twenty dollars. It is true the complainant here is not, strictly, seeking to enforce a debt or demand, but the case, nevertheless, falls within the purview of the law. The object of the legislature (and it was a very proper one) was to prevent the higher courts from being opened to petty litigation, in regard to sums of trifling magnitude. The Circuit Court properly dismissed the bill.

Decree affirmed.

JOHANN KERP

v.

WILLIAM FUCHS.

FEES AND SALARIES — *duties of clerks — and fees for entering suits for trial.* The statute makes it the duty of the clerks of the Circuit Courts to prepare and keep a docket of all causes pending in their respective courts, in which shall be entered the names of the parties, the cause of action, and name of the plaintiff's attorney; and to furnish the judge and the bar, at each term, with a copy of the same; and provides, that for this labor the clerk shall be entitled to a fee of ten cents for entering each suit on the docket for trial. The Circuit Court overruled a motion to retax a bill of costs, charging ten cents each for entering a cause on the docket of the judge, the bar, and the clerk — *held,* that only one charge of ten cents can be made for docketing each cause on the trial docket, and that no charge can be made for entering a cause on the copies for the judge and the bar.

APPEAL from the Circuit Court of Bureau county; the Hon. G. S. ELDRIDGE, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Mr. G. G. GIBONS, for the appellant.

Mr. GEORGE O. IDE, for the appellee.

Opinion of the Court.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

The only question presented by this record is, whether the clerk has the right to charge ten cents each, for entering a cause on the docket of the judge, the clerk, and the bar, or is only entitled to ten cents for making all three entries. It is declared, by the 7th section of the chapter entitled, "Fees and salaries" (Scates' Comp. 510), that the clerk of the Circuit Court shall receive "for entering each suit on the docket for trial, ten cents." And the 9th section of the chapter entitled "Practice" (Scates' Comp. 265), declares, that the "clerks of the Circuit Courts shall keep a docket of all causes pending in their respective courts, in which shall be entered the names of the parties, the cause of action, and the name of the plaintiff's attorney; and he shall furnish the judge and the bar, at each term, with a copy of the same."

By these provisions, the charge can only be made for docketing the cause for trial. Any other docketing is not embraced in the enactment. And the charge is only allowed for entering it on the docket, and not for entering it on the copy. There is but one docket and the others are copies of that one, and the fee is allowed for making the entry thereon as required. If it had been intended, that a fee should be allowed for any other entry than that on the docket, the language would have embraced each entry on the docket and on the copies. It would not have been limited to the entry on the docket. The law requires that the two copies shall be made, but has failed to provide a compensation for it, unless it is embraced in the annual allowance to the clerks for extra services like the present. We, therefore, think the court below erred in refusing to retax the bill of costs, as the clerk should have been allowed for docketing the case but once, instead of three times. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JOHN BATES *et al.*

v.

DANIEL WILLIAMS, for use of JACOB SCHOONOVER.

1. PLEADING — *estoppel.* In an action upon a replevin bond, it was objected by the obligor, upon general demurrer, that the declaration did not aver that the justice of the peace before whom the action of replevin was tried had jurisdiction of the cause: *Held*, that, having sought that jurisdiction, he was estopped by his own act and admission.

2. PRACTICE — *default — assessment of damages.* Where a defendant demurs to a declaration, and his demurrer is overruled, and he fails to obtain leave to plead, a default for want of a plea is the necessary consequence. The judgment on the demurrer in such case is, that plaintiff recover his debt, and damages occasioned by detention of the same, to assess which a jury should be called.

3. VERDICT — *informality of.* Where a verdict does substantial justice, and the party against whom rendered shows no merits, informality should not vitiate it.

APPEAL from the Circuit Court of Livingston county; the Hon. CHARLES R. STARR, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Mr. C. J. BEATTIE, for the appellants.

Messrs. FLEMING, PILLSBURY & PLUMB, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The only questions made on this record are, as to the sufficiency of the declaration, and the assessment of damages by the jury.

The action was for debt on a replevin bond executed by appellant to a constable. On a trial of the suit in replevin, the plaintiff failed to establish his right to the property, and a writ of *retorno habendo* was awarded.

The main objection taken to the declaration is, that it does not aver, that the justice of the peace before whom the action of replevin was tried had jurisdiction of the cause.

When it is considered, that appellant himself sought that jurisdiction, and executed the bond in question in order to avail of it, he cannot now make such an objection. He is estopped by his own act and admission. This principle is recognized in the case of *Shaw* v. *Havekluft*, 21 Ill. 127, and in other cases.

The demurrer was general, and, on its being overruled, appellant abided by his demurrer, and a jury was called to assess the damages, the record reciting, on defendants abiding by their demurrer, judgment by default is entered against them. Appellant's counsel insists, that such is not the fact,—that they appeared and filed their demurrer, and, consequently, were not in default. Appellant's counsel fails to remember there is more than one kind of default. The first is that of appearance; where a party, duly notified, fails to make an appearance, his default is entered as of course. Another is default of plea. This was the default appellant suffered. On overruling the demurrer, if they had a defense, they should have obtained leave to plead. Not doing so, their default for want of a plea was the necessary consequence.

The judgment on the demurrer was in chief for the plaintiff, that he ought to recover his debt (naming it) and his damages occasioned by the detention of the same; but, as these are unknown to the court, let a jury come, etc. This is the formal entry. The court should have entered judgment for the specific debt, and then submitted the question of damages to the jury.

The most that can be said against the verdict of the jury is, that it is informal, finding the debt on a default, and finding the defendants guilty. The damages are well assessed according to the evidence. The informal parts of the verdict should not vitiate it. The appellants show no merits, and justice seems to have been done.

Judgment affirmed.

THE CITY OF CHICAGO
v.
JONATHAN A. ALLEN *et ux.*

EVIDENCE — *irrelevancy — and inadmissibility of.* In an action for an injury sustained through the overturning of a carriage, by reason of a hole made and left in the street by city authorities, evidence that the injured party, during the following winter, went to Cuba, for the more perfect restoration of health, without showing that the change was necessary to a complete recovery — *held* inadmissible and improper, as tending to influence the jury in giving damages.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

The opinion of the court contains a statement of the case.

Mr. S. A. IRWIN, for the appellant.

Messrs. WALKER & DEXTER, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

This was an action brought by the appellees against the city of Chicago, for injuries received by Mrs. Allen from the overturning of a carriage, consequent upon its being driven into a hole made by the city in repairing a street and left unguarded. The collar-bone of Mrs. Allen was fractured. The jury found for the plaintiffs a verdict for four thousand dollars, and the city appealed.

On the trial, the plaintiffs, against the objection of the defendant, was permitted to prove, that Mrs. Allen passed the winter succeeding the accident, in the island of Cuba, with a view to the more perfect restoration of her health. This evidence is stated in the record to have been admitted by the court as tending to show the extent of the injury. We are wholly unable to see in what way it could shed light upon that subject, or upon what ground it was admissible. If it had been shown that a change of climate was necessary to a complete recovery

from injuries caused by this accident, and was likely to lead to such a result, and that the desired climate could not be found nearer than Cuba, then the evidence would have been admissible. But nothing of that kind was shown. The accident occurred in August. The following winter the plaintiff went to Cuba for the improvement of her health, which seems not to have been perfect prior to the accident. That this accident made such a journey necessary is not shown, and yet the jury, from the mere fact that such proof was permitted to be made, would be quite certain to give this evidence weight in fixing the amount of damages. For the error in admitting this evidence, the judgment must be reversed.

Judgment reversed.

JOHN S. BROWN
v.
ARCHIBALD C. LECKIE *et al.*

1. CHECK — *certified good.* The certifying a check "good," produces no other effect than to give it additional currency by carrying with it the evidence that it is drawn in good faith and its payment will be met, and by lending to it the credit of the drawee in addition to that of the drawer. Beyond this it does not differ from an uncertified check.

2. SAME — *effect of drawing check on fund.* Where a depositor draws his check on his banker who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to the payee, who might sue for and recover the amount from the banker. And a transfer of the check carries with it the title to the sum named in the check to each successive holder.

3. SAME. Although certified checks pass from hand to hand as money, as cash, still they are not cash, or currency, in the legal sense of that term, and do not lose the characteristics of bills of exchange, and when dishonored, the holder has a right to look to the drawer for payment. As the acceptance of a bill does not discharge the drawer, so neither does the acceptance of a check, manifested by the word "good" placed upon it by the drawer, discharge the drawer. According to authority they rest on the same principles, and in this respect there is no difference.

Statement of the case.

4. CHECK—*certified good—drawer charged with the amount.* It can make no difference if the drawer is charged with the amount of the check, when the drawee indorses it "good." According to general usage the banker expects to pay the check out of the funds of the drawer in his hands, and makes a memorandum, or takes some other course by which he will not permit the amount necessary to meet it to be anticipated, and this is understood by the drawer and the payee. It therefore does not matter whether it is actually charged up at the time, as in either case the funds pass from the control of the drawer.

5. SAME—*set-off by banker.* A banker can not set off a demand he holds against the person presenting a check for payment. When a check is received in the usual course of business, it is not presumed to be received in payment, but rather as a means to procure payment. The holder becomes the agent to collect the money of the drawer, and if not guilty of negligence that injures the drawer, the holder will not be answerable if the banker refuses payment. In a suit against the drawer, the holder may treat it as a nullity, and resort to the original cause of action. To hold otherwise would greatly embarrass the business of the commercial world.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit brought by Archibald Leckie, George H. Sellers and William A. Leckie, partners, under the name and style of Leckie, Sellers & Co., in the Superior Court of Chicago, against John S. Brown, to recover the amount of a check for $3,380.24, drawn by defendant, in favor of plaintiffs, on Solomon Sturgis' Sons.

The declaration contained two special counts on the check, and the common counts. Defendant pleaded the general issue.

The cause was tried before the court and a jury, at the December Term, 1866. After hearing the evidence, the jury found a verdict in favor of the plaintiffs for 3,474.80. Defendant thereupon entered a motion for a new trial, which was overruled by the court, and judgment was rendered upon the verdict; and he brings the case to this court by appeal. He assigns errors: that the verdict is against the law and the evidence; that the court erred in excluding evidence, in overruling the motion for a new trial, and in rendering judgment.

Messrs. WALKER & DEXTER, for the appellant.

Mr. O. B. SANSUM, for the appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the Court:

This was an action brought by appellees in the Superior Court of Chicago, against appellant, on this check:

"CHICAGO, July 7, 1866.

"SOLOMON STURGIS' SONS:

"Pay to Leckie, Sellers & Co., thirty-three hundred, eighty and 24–100 dollars.

"$3,380.24. J. S. BROWN & CO."

It was certified across its face, "Good, S. Sturgis' Sons." It appeared on the trial, that about the date of the check, appellees sold to appellant a quantity of high-wines, and in payment thereof he gave this check, certified as good, by the drawees. A short time subsequently, appellees presented the check for payment, which Solomon Sturgis' Sons refused to make in money, but offered to place it to their credit, who were at the time indebted to them, as they claimed.

This appellees refused to allow, and demanded the money on the check. They thereupon returned the check to appellant, and demanded the money or another check, which was refused.

Before the check was received by appellees, and at the time it was certified to be good, the amount called for in the check was charged to appellant's account with Solomon Sturgis' Sons.

On the trial, appellant offered to prove that when the check was presented to Solomon Sturgis' Sons, appellees were indebted to them in a sum larger than the amount of the check, and that they, as drawees, offered to credit the check upon appellees' account. But the court below refused to permit him to introduce such evidence, to which appellant excepted. The jury found a verdict in favor of appellees, for the amount of the check and interest.

No question is made, in this case, as to the presentment and notice of non-payment; and these questions do not arise on this record. We will therefore proceed to the consideration of those which are presented.

In the cases of *Rounds* v. *Smith*, and *Bickford* v. *The First National Bank*, 42 Ill. 238, the question was presented as to the effect of certifying a check "good." It was held, that its only effect was to give it additional currency, by carrying with it the evidence that it was drawn in good faith, on funds to meet its payment, and lending to it the credit of the drawee, in addition to the credit of the drawer. That beyond this, it did not differ from an uncertified check. In those cases, however, the amount of the check was not charged up to the drawer. In that respect, this case differs from those.

In those cases, it was held, as it had been in the case of *Munn* v. *Burch*, 25 Ill. 35, that when a depositor draws his check on his banker, who has his funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who might sue for and recover the amount from the banker, and that a transfer of the check carried with it the title to the amount named in the check, to each successive holder. In the case of *Bickford* v. *The First National Bank*, it was held, that, although certified checks pass from hand to hand as cash, still they are not cash, or currency, in the legal sense of these terms, and they do not lose, on that account, any of the characteristics of bills of exchange, and, therefore, when dishonored, the holder has a right to look to the drawer for payment; and *Munn* v. *Burch* is referred to in support of this doctrine: that, as the acceptance of a bill of exchange does not discharge the drawer, if protested for non-payment, so, neither should the acceptance of a check, manifested by the word "good" placed upon it by the bank, discharge the drawer; that, according to the weight of authority, they seem to rest on the same principle. In this respect, there can be no difference between an uncertified and a certified check, the dishonor of either, on well settled principles, must make the drawer liable.

According to the principles announced in this case, it can

make no difference whether the drawer is actually charged on the books of the drawee or not, with the amount of the check, when it is indorsed "good." According to general usage, the banker, when he makes such an indorsement, expects to pay the check out of the drawer's funds in his hands, and makes some memorandum, or takes some other course, by which he will not permit the amount necessary to meet the check to be anticipated; and this, both the drawer and payee understand. So, it will be seen, that the practical effect of certifying a check is the same, whether the drawer is actually charged on the books or not, as in either case, that amount of his funds is withdrawn from his control until the payment of the check is refused.

The remaining question is, whether the banker, upon whom the certified check was drawn, may, when it is presented, set off the indebtedness of the holder, against the check. In the case of *Cromwell* v. *Wing*, 1 Hall (N. Y.) 56, it was held, that a check on a banker, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means to procure the money. The holder, in such a case, becomes the agent of the drawer to collect the money; and, if guilty of no negligence whereby an actual injury is sustained by the drawer, he will not be answerable, if, from any peculiar circumstances attending the bank, the check is not paid. And in a suit against the drawer for the consideration of such a check, the holder may treat it as a nullity, and resort to the original cause of action.

When it is remembered, that almost all of the vast sums of money employed in carrying on the commerce of the world, is paid out by means of checks, which are not received as payment by the creditor or vendor, but simply as the means, and the *usual* means, of obtaining his money, it is but reasonable to regard the holder of the check as an agent of the drawer. Again, vast amounts of property are sold by agents, brokers, and commission men, for the benefit of their principals, and it would be unreasonable and unjust, when they received a check as the means of procuring the money of their principals, to

permit bankers to set off any demand they might have against such a holder. If the holder is only treated as the agent of the drawer, it would be manifestly wrong to permit the banker to set off this debt of the agent, against the debt he owes to the drawer. Not only so, but it would be in violation of all the rules relating to set-off.

It is true, in this case there was no plea of set-off interposed, nor do counsel call it set-off, but it could be nothing else. Even if it had constituted a defense, to have availed of it appellant should have pleaded it. In no view that we can take of this case, do we see that appellant presented any defense in the court below. Nor do we discover any error in this record. The judgment of the court below must, therefore, be affirmed.

Judgment affirmed.

HARRY WHITE
v.
JOHN GILLMAN.

CONTRACT — *condition precedent.* Appellee sold upon credit to appellant, his landlord, all the crops he had raised on his land, at the price of $500, and agreed to leave the premises in ten days with all his "traps." Appellee did leave, and removed the greater part of his property within the time specified, but left around the premises some geese, shoats, sheep and ducks, for a longer period. Appellant entered and took possession of the crops, but refused to pay, on the ground, that the removal of appellee with all his property was a condition precedent. *Held*, it was not, and that appellant having received value, law and justice both combined in requiring him to pay the amount he agreed.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon R. G. MONTONY, Judge, presiding.

The facts of the case sufficiently appear in the opinion of the court.

Mr. C. J. METZNER, for the appellant.

Messrs. WAGNER & CANFIELD, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It was substantially proved, that the plaintiff, Gillman, sold out to White all his interest in the crop he had raised on White's land, for which White was to pay him five hundred dollars, and Gillman was to leave the premises with all his "traps" in ten days. Gillman did leave the premises with the bulk of his property and effects within the ten days, but left some geese and some shoats remaining there, and some sheep roaming about the place, and some ducks and turkeys. The appellant claimed that this removal with all his "traps" in ten days, was a condition precedent, and not being performed to the letter by Gillman, he had no right of action to recover the five hundred dollars, but this construction cannot be allowed. This proposition he has embodied in several instructions, which the court refused to give.

The questions arising upon these instructions were fully considered and decided by this court, in the case of *Nelson* v. *Oren*, 41 Ill. 18; and the case of *Boone* v. *Eyre*, 1 H. Bl. 273, commented on at length. The principles of that case govern this. Here the contract was executed in part, of which White has the full enjoyment. For a failure by Gillman to remove "all his traps" in ten days, he was liable to damages, and that question of damages was submitted, by agreement of these parties, to the jury trying this case. Here, White claims to keep the crop Gillman raised, worth five hundred dollars, because Gillman did not take his ducks and geese, and a few shoats and turkeys off the place, in ten days.

As in *Boone* v. *Eyre*, if the plea there interposed was allowed, any one negro, not being the property of the plaintiff, would bar the action, although the estate had passed out of the plaintiff, and gone to the defendant; so here, a single duck or goose remaining on these premises, would defeat the plaintiff's right to recover for his whole crop. The absurdity of the proposition is manifest. If White had been damaged by reason that these articles were not removed in ten days, the jury could and would have awarded damages to him. He is in the enjoyment of the object of the contract, which was the crop, and

for the price of which, he got an allowance by the assessor as for hired labor. Law and justice both combine in requiring White to pay the amount he agreed to pay. He has value for it.

As to the instructions given for the plaintiff, there may be some technical inaccuracies in them, but they lay down, correctly, the rule governing the case; and the verdict is so manifestly right on the evidence, that slight technical errors in the instructions, should not be permitted to disturb it.

The modification made by the court to the defendant's last instruction was proper, and is in harmony with the views we expressed in the case of *Nelson* v. *Oren*, *supra*, and with the law.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM DICKSON
v.
JAMES TODD *et al.*

1. RES ADJUDICATA — *what constitutes.* The holder of certain lots of ground by contract of purchase, conveyed the same by deed to another person, but before that deed was recorded the grantor therein procured his vendor to convey the premises to a trustee to secure certain indebtedness of the former, and on default in payment the premises were sold under the deed of trust, a third person becoming the purchaser. The grantee in the first deed then filed his bill in chancery, claiming title to the premises, and the right to redeem from the sale under the trust deed, and on a hearing that bill was dismissed. Pending that suit a judgment was recovered against the complainant therein, and his interest in the lots was levied upon and sold, and the title passed by means of a redemption by a judgment creditor, and a transfer of the sheriff's certificate to a third person, to whom the sheriff made a deed. A subsequent grantee under the title derived through the sale under the deed of trust filed a bill against the holder of the title derived under the execution sale, to remove the cloud upon the title of the complainant created thereby, whereupon the defendant filed his cross-bill, claiming the right to redeem from the trust sale, and thereby to acquire the title to the premises. It was *held*, that the rights of the defendant in the last suit, holding as a purchaser *pendente lite* under the title of the complainant in the first suit, were fully adjudicated and settled by the decree in such former suit.

2. PURCHASERS *pendente lite—bound by the judgment or decree rendered.* Judgments and decrees bind equally parties and privies, and a purchaser *pendente lite* stands in the latter category.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

The facts in this case are fully stated in the opinion.

Mr. W. T. BURGESS, for the appellant.

Messrs. HOYNE & HORTON and Mr. J. P. ATWOOD, for the appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

On the 7th of August, 1843, Lewis W. Clark, holding lots 14, 15 and 16, in block 22 in Wolcott's addition to Chicago, by a contract of purchase from Ogden, conveyed the same to his sister, Letty M. Clark. On the 27th of July, 1848, Clark, being indebted to Erastus Corning & Co , caused Ogden to convey the legal title to Burch, as trustee, to secure the payment of said debt. Clark himself united in this deed, and it was executed and recorded before the record of the above named deed to Letty M. Clark. Default having been made in the payment to Corning & Co., Burch sold, under the deed of trust, on the 9th of October, 1851, and Buckner S. Morris became the purchaser, to whom Burch did not then make a deed, but gave a memorandum of the sale. Morris was surety for Clark, on the debt due Corning & Co. On the 22d of November, 1854, Lewis W. Clark conveyed the premises to Henry H. Honore.

While the title stood in this condition, and on the 2d of May, 1855 (Burch not having yet conveyed to Morris), Letty M. Clark filed her bill in the Common Pleas Court of Cook county, making parties, Burch, Morris, Ogden, Corning & Co. and the widow and heirs of Lewis W. Clark, who had, in the meantime, departed this life, and claimed title in her bill to these lots, under her deed from Clark, on the ground, that, although the deed of trust to Burch was first recorded, the parties thereto,

and all persons claiming under it, were chargeable with actual notice through her alleged possession of the property. The bill further charged, that the purchase by Morris, at the sale under the deed of trust, was for the benefit of Clark, and in secret trust for him, and to enable him to hold the property discharged of the rights of the complainant, under her deed of August 7th, 1843. The bill prayed that an account be taken of the debt due Corning & Co., and secured by the deed of trust, and that the complainant be permitted to redeem the property by paying the amount found due. The defendants answered, and the case having been heard on the pleadings and proofs, the bill was dismissed. The complainant brought the record to this court, and the decree of the Common Pleas was affirmed. The case is reported in 22 Ill. 434.

While the foregoing suit was pending, one Benedict recovered a judgment against Letty M. Clark, upon which execution issued, and the sheriff sold her interest in the lots in controversy to one Hall. The title thus acquired passed by means of a redemption by another judgment creditor, and a transfer of the sheriff's certificate, to Dickson, the present appellant, and on the 12th of July, 1858, the sheriff made him a deed. All this occurred pending the above mentioned suit.

After that suit was finally disposed of in this court, Burch, still holding the legal title, conveyed it to Morris, who, as already stated, had become the purchaser at the sale under the deed of trust, before that suit had commenced, and Morris, on the 30th of January, 1860, conveyed to Honore, who, on the 6th of April, 1860, conveyed, for a valuable consideration, to Todd. The bill in this case was filed by Todd against Dickson, to remove the cloud upon the title created by Dickson's claim to the premises, under his sheriff's deed, above mentioned. Dickson answered, and filed a cross-bill claiming the right to redeem from the sale under the Burch deed of trust, and by redeeming, acquire title to the premises. The Circuit Court decreed in favor of Todd, and dismissed the cross-bill. Dickson brings the record here by appeal.

The statement of the foregoing facts is nearly all that is necessary to be said to dispose of this case. A plainer instance

of *res adjudicata* does not often arise. If the rights of the parties to this record are not concluded by the former litigation and decree in the case of Letty M. Clark against Morris and others, we shall almost despair of definitely settling the rights of parties in any suit. It is not denied by counsel for appellant that Dickson, who acquired the title of Letty M. Clark pending the former suit, took it subject to whatever decree in that suit the court might make. This is familiar law. If such were not the rule, parties, by transferring their rights *pendente lite*, might keep the door of litigation perpetually open over the same subject matter. Judgments and decrees bind equally parties and privies, and a purchaser *pendente lite* stands in the latter category.

In this suit, then, Dickson stands in the shoes of Letty M. Clark, and is bound by the former decree against her, in favor of the parties under whom Todd claims, if the subject matter of the two suits was the same. The only difference which the counsel for the appellant attempts to point out is this: He insists, that the *title* to the premises, as a question of paramount title, was only in controversy in the first suit, while the present cross-bill is a bill to redeem. But this is an error. The bill in the former case did not proceed on the ground of paramount title alone; on the contrary, it distinctly put in issue the right to redeem from the sale under the trust deed. As we have already shown, in speaking of that bill, it avers, that the purchase by Morris, under the trust deed, was made for the benefit of Lewis W. Clark, and in trust for him, and to enable him to hold the premises discharged of the claim of Letty M. Clark, under her deed of August 7, 1843, and asks an account to be stated between Clark and Corning & Co., and to be permitted to redeem. It is, therefore, perfectly clear, that the right to redeem was as much in issue in the former suit as in the present.

Counsel allege, that the present cross-bill avers an agreement between Morris and Clark, that Clark should be permitted to redeem, and in that respect differs from the former bill. But this is simply averring a circumstance, which, if true, would go

to show that Morris did purchase in trust for Clark, subject to the payment of his advances, and the allegation that he did so purchase was made in the former bill, and the right to redeem was claimed as a consequence. Proof of the agreement, alleged in the present bill to have been made, would have been admissible in evidence under the former bill. Indeed, the evidence relied upon to prove such agreement is the answer of Morris to the former bill. But it is sufficient to say, that the question, whether there was a trust for the benefit of Clark in the purchase of Morris, and whether there was a consequent right to redeem, were distinctly put in issue in the former cause, and decided against the then complainant. That decree is binding upon Dickson, and conclusive of the present case.

Decree affirmed.

MARTIN O. WALKER *et al.*

v.

HUGH MARTIN.

1. HABEAS CORPUS — *presumption, and effect of discharge.* When no reason is assigned in the order of discharge, it will be presumed that the court examined into the merits of the case and became satisfied the criminal charge was not established. Under our statute a discharge upon *habeas corpus*, does not preclude an investigation by the grand jury.

2. MALICIOUS PROSECUTION — *when action may be commenced.* To maintain this action the plaintiff must show that the criminal prosecution was legally ended before the action was commenced. If the criminal prosecution be not ended at the time the action is commenced, then the action is premature.

3. On the trial of an action for malicious prosecution, the plaintiff who had been bound over to appear before the Recorder's Court of the city of Chicago, showed a discharge upon *habeas corpus*, by the Circuit Court of Cook county, to prove that the criminal prosecution had been ended; *held*, that it should also have been made to appear on the trial that the State's attorney did not send the case with the recognized witnesses to the grand jury, or if he did send them that no steps had been taken by the people.

4. DAMAGES — *excessiveness of.* While great latitude must and is allowed juries in all actions for personal torts, yet it must be confined within some limits — no less for justice' sake than for the protection of the citizen.

Statement of the case.

5. Where, in estimating damages, it is obvious the jury was actuated by improper motives, or where the amount of the verdict is so extravagantly large as to shock the mind, and it is plain that the jury could not have taken into consideration that the plaintiff was a man of bad character, the court will not hesitate to set the judgment aside, on the ground that the damages are excessive.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action on the case brought by Hugh Martin against Martin O. Walker and Guy H. Cutting, in the Cook Circuit Court, for malicious prosecution. A change of venue was taken to Will county, where the case was tried before a jury, and resulted in a verdict and judgment in favor of appellee for twenty thousand dollars.

The declaration contains three counts.

The first and second of which allege, that on the 17th day of March, 1866, defendants charged plaintiff with larceny of coal, and caused a justice to issue a warrant for his apprehension, and on the 29th day of March, caused him to be arrested under said warrant — detained seven hours — and held to bail for his appearance at the next term of the Recorder's Court of the city of Chicago, and also committed him to the jail of Cook county, and there kept him for nine days then next following, until, on the 5th day of April, 1866, to procure his release from imprisonment, plaintiff sued out of the Circuit Court of Cook county, a writ of *habeas corpus*, by virtue of which he was conveyed before said court, on the 7th day of April, 1866, and then and there adjudged and determined not guilty of said supposed offense, and fully acquitted and discharged; and that defendants have not further prosecuted said complaint, but deserted and abandoned the same, and that the said complaint and prosecution is ended and determined.

The third count is general, and, without specifying any manner of discharge, alleges an arrest on the 29th day of March, 1866, for felony, and that at the expiration of nine days, the plaintiff was duly discharged and fully acquitted.

The plaintiff's evidence shows, that a warrant was issued against him on the 17th day of March, 1866; that on the 29th day of the same month he was arrested and brought before the justice. That an examination took place on that day, and he was required to give bail in the sum of three hundred dollars for his appearance in the Recorder's Court, in default of which he was committed to the Cook county jail.

The only proof introduced on the trial, tending to show the prosecution ended, was, that on the 5th day of April, A. D. 1866, the plaintiff sued a writ of *habeas corpus* out of the Circuit Court of Cook county, and on the 7th day of the same month was discharged from imprisonment by an order of that court in these words, "and it appearing to the court that the said Hugh Martin, relator as aforesaid, is illegally detained under the custody of the said John A. Nelson, sheriff, etc., therefore it is ordered and considered by the court, that the said Hugh Martin, relator as aforesaid, be and he is hereby discharged, out of the custody of said John A. Nelson, sheriff, etc., and that he go hence thereof without day."

The defendants moved the court to exclude from the evidence in the case, the record of proceedings in the Cook Circuit Court on *habeas corpus*, on the following grounds:

1. Of variance between such record, and the statements of the declaration.

2. That such record did not show plaintiff to have been discharged in the manner alleged, which motion the court overruled and defendants excepted.

The defendants' counsel then moved to exclude all plaintiff's evidence on the same grounds; and also, on the ground that it did not appear that there had been a legal determination of the charge against plaintiff by the proceedings thereon, or that the same has been wholly ended.

This motion was also overruled, and exception taken.

The defense introduced several witnesses who testified that plaintiff's character for honesty and integrity was bad.

Mr. W. K. MCALLISTER, for the appellant.

Messrs. U. F. LINDER and G. W. BRANT, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The first point made on this record is, that the action is prematurely brought, for the reason, that the criminal prosecution which originated it was not legally terminated at the time it was commenced, neither by the action or decision of a competent tribunal, nor by abandonment thereof by the appellants as prosecutors.

It appears, a warrant was issued against Martin on the affidavit of Cutting, one of the appellants, made before a justice of the peace of Cook county, charging him with the larceny of some coal, the property of appellants. Martin was arrested on this warrant and brought before the justice, was examined in relation to the charge, and both of the appellants testified as witnesses. Martin was required to give bail for his appearance at the next term of the Recorder's Court to answer the charge; failing to do this, he was committed to jail, where he remained nine days, during which time, he applied to the Circuit Court of Cook county for a writ of *habeas corpus*. A hearing was had on this writ on Saturday, the 7th day of April, and Martin was discharged on that day. On the following Monday, the 9th of April, he commenced this action.

Do these facts show that the prosecution was legally ended?

It is very clear, that, by the proceedings before the magistrate, the prosecution was not ended, for he required the accused to appear at the next term of the Recorder's Court to answer the charge, and, as we must suppose, for the law made it the duty of the magistrate so to do, that he bound over the witnesses who had testified before him to appear at that court at the same term; and we must further presume, that the magistrate returned all the papers to that court, as the law requires. That court commenced its term on the second day of April, the law requiring, that the regular terms of that court shall commence on the first Monday of every month, and was in session on the day the accused was discharged. He was required by the magistrate to appear on the first day of the next term, which would have been the 2d day of April, the commitment having been

on the 29th day of March; the Circuit Court discharged him on the *habeas corpus*.

What effect had this discharge on the recognizance to appear before the Recorder's Court? Appellee contends, that it superseded and nullified all the proceedings before the magistrate, and precluded investigation by the grand jury of the Recorder's Court. We cannot know, for the record does not state, why the Circuit Court discharged the accused — for which one of the seven causes specified in the *habeas corpus* act. Perchance, as suggested by appellants, it was for the reason the process issued by the magistrate was defective in some substantial form required by law. No reason for his discharge is assigned in the order of discharge, nor is there any statement in it, that the merits were investigated, and the innocence of the accused made manifest, or any thing of that nature. But we must presume the court did examine the merits of the case, and became satisfied the criminal charge was not established. The law made it the duty of the court to investigate the charge, and we must presume the court performed its whole duty.

But to say, that the prosecution was legally terminated, by what appears in this record, when the record shows the return of the papers and the bail bond for the appearance of the witnesses before that court, and as nothing is shown of the final action of that court thereon, to insist that the discharge on *habeas corpus* precluded an investigation by the grand jury, is not the law, nor is it reasonable. A prisoner may be discharged from actual imprisonment by the efficacy of this writ, but it does not wipe out the offense. A hearing on *habeas corpus* is had, most usually, for the purpose of admitting the accused to bail; and though, in the opinion of a majority of the court, the judge or court granting the writ may revise and reverse the decision of the committing magistrate, on the merits, still, the statute emphatically declares, that the accused may be again imprisoned for the same cause, if an indictment be found against him, or by the legal order or process of the court, wherein he is bound by recognizance to appear. Scates' Comp. 810, *Habeas corpus* act, § 7. Hence, it follows, that

the case of the accused was subject to the action of the Recorder's Court.

The appellee in this case should have shown, or it should have been made to appear on the trial, that the State's attorney did not send the case, with the recognized witnesses, to the grand jury. Or if he did send them, and no steps were taken by the people in the Recorder's Court, then the discharge under the *habeas corpus* act should be considered as having ended the prosecution.

Under the facts shown in this record, the prosecution was not ended by the discharge of the appellee by the Circuit Court. On principle, and for the safety of the republic, such a discharge should not *per se* have such an effect. If it had, the vilest criminals might go "unwhipp'd of justice."

The remaining question is, are the damages excessive?

That the courts have power to set aside verdicts, for the reason that the damages assessed are excessive, is not, and cannot be, questioned. It has been exercised, without challenge, for more than two hundred years, and has grown into a principle, in our system of jurisprudence, which we are not at liberty to disregard. Cases are numerous in which this court has exercised this power, always reluctantly, yet, in every case, where it appeared probable, from the amount of damages assessed, that the jury had acted under the influence of prejudice or passion. In such cases, it would be a severe reflection upon the law, and a stigma upon the trial by jury itself, to say that no redress could be afforded — to admit that a jury is "a chartered libertine," free to indulge their worst passions, and through their influence, victimize every man who may be so unfortunate as to have a case before it, in which his conduct does not show to the best advantage. A jury has the power, in a proper case, to visit a *tort feasor* with heavy damages, but it has no right to crush him. While great latitude must be and is allowed juries in all actions for personal torts, yet, it must be confined within some limits, no less for justice's sake than for the protection of the citizen. In these kind of torts it is impossible to estimate precisely the measure of damages

which would repair the alleged injury. To a great extent it is a matter of sentiment and feeling, under the guidance of sound judgment, duly weighing all the circumstances of the case, as was said by Chief Justice THOMPSON, in the case of *McConnell* v. *Hampton*, 12 Johns. 234. In that case, Hampton, a general in the service of the United States in the war of 1812, had arrested, in August, 1813, one McConnell, and had him taken to the guard-house and confined from Tuesday until the following Sunday. He lay on the floor of the guard-house without any bed. He was allowed to procure his own provisions, and had, besides, the rations of a soldier, and was permitted to speak to others, in the presence of an officer, but not allowed to leave the guard-house. The witness stated that McConnell was "a back and forth trader, and of a respectable character." Hampton declared to the witness, that he should have been justified to have hanged McConnell immediately at the halberts, but would have him tried by a court-martial; that Hampton afterward declared that McConnell was not in a worse situation than he ought to be; that he could convict him, and that he should be convicted, if possible, and hanged; for he was guilty of treason, and had been in company with two British officers, and had given information to the enemy. This was explained favorably to McConnell, and another witness stated, that, at the time of the court-martial, Hampton appeared much prejudiced against the plaintiff, and it was understood there was a personal difference between them. General Hampton, it was proved, was a man of liberal education, and had a yearly income of sixty thousand dollars.

The jury found a verdict for the plaintiff for nine thousand dollars damages, which was set aside solely on the ground that the damages were excessive.

The judge admitted that the circumstances of the case, when viewed on one side only, were well calculated to excite feelings of indignation in a jury, and if the defendant was wantonly exercising his military power for the purpose of gratifying any private resentment, it was an aggravated case. And the judge said there was good reason for believing, from the amount of

damages, that some such considerations must have operated on the feelings of the jury, without duly weighing the circumstances, which went to show, and afforded good ground to believe, that the defendant acted under an honest, though mistaken opinion, that he had a right to try the plaintiff on a charge of treason; and if this was a fair conclusion to be drawn from the testimony, it would strike every one, at first blush, that the damages allowed were outrageous.

And this distinguished judge said, "To refuse a new trial, would, in effect, be saying that a new trial ought never to be granted in actions of this description; and, although the defendant is a man of very large fortune, the plaintiff's injury is not thereby enhanced."

There are some points of resemblance between that case and this. That was an action of trespass for an assault and false imprisonment: this is an action on the case for a malicious prosecution. In both, it is insisted, the law was perverted to a bad purpose, malice and oppression are perceivable in both, and the defendants in both are men of large fortune. In one case a verdict of nine thousand dollars was set aside, as outrageous. In this case the verdict is for twenty thousand dollars, a sum greater than the private fortunes of two-thirds of our whole population. We make no attempt now to find circumstances to mitigate the wrong done by the appellants to appellee, but have taken it in all its magnitude, and admit that appellants did, maliciously, without probable cause, prosecute appellee, on a charge of larceny of coal belonging to appellants; that they did imprison him for some days, and that the accused was discharged from imprisonment, and from the charge by a court of competent authority, and that Walker boasted of what he had done, and declared his ability to pay any damages a jury might find against him, and this in a public tavern, at the time the trial of his case was going on.

But there is one fact, which the jury do not seem to have heeded, in estimating the damages — that is, the plaintiff's character. The weight of evidence is, that it was bad, and that should have had much weight with the jury. This action of

malicious prosecution, is of kin to the action of slander, and as in that, the damage consists in part in injury to character by a criminal charge, and not wholly in the mere physical injury consequent on the imprisonment on the charge. There is a vast difference between men in society, although theoretically they are all equal. He who has a fair character among his acquaintances and in community generally, is entitled, in an action for defaming it, to greater damages than one suing on a doubtful character; but it must be a very strong case indeed, in which any man, no matter how high may be his social position, no matter how unsullied his character, can be accorded the right to receive for defaming it the enormous sum given in this case. It is a handsome fortune, and places the receiver of it at once on high and independent ground. "It is a golden shower, and pour'd, not on the head of purity and innocence." Its parallel cannot be found in such an action in the judicial annals of any country in the civilized world.

Though damages in such cases are very much a matter of sentiment and feeling, and no rule can be prescribed by which they shall be measured, still, the judgment of the jury must be exercised in every case, and all the circumstances duly weighed by them. It seems to us, the jury did not give proper weight to the evidence of respectable men, that the plaintiff's character was not good; that he was not an object on which they should lavish so much generosity; that nothing which the appellants did, however maliciously, demanded at the hands of the jury such a vengeful bolt as they hurled at the appellants. The conduct of one of them, while attending the trial of the issue in Will county, though evincing a high degree of malice, though it manifested a reckless disregard of the feelings of appellee, and a spirit of bravado and persecution, not to be tolerated, and most unjustifiable, yet, with all this, the verdict for the wrong is outrageous. No impartial and unprejudiced mind can, for a single moment, indulge the supposition, that appellee was entitled to $20,000. As this court said in *Park's case*, 18 Ill. 460, "the very statement of the proposition is startling, and carries conviction to the mind at once, that the jury

were led to find their verdict, not from the facts alone, and the law as applicable to those facts"; and we say, as was further said in that case, "this verdict cannot, upon principle, be sustained. To uphold it, would not only be doing a great wrong to the appellee in this particular case, but as a precedent would be doing an infinitely greater wrong to the community, who might suffer by it."

The verdict in that case was but for $1,000, and the wrong done was upon a distinguished member of the bar of this court of good character and high standing therein. What then shall be said of this verdict, dwarfing as it does all previous verdicts ever rendered in a like case? Can we say less, than that it is the result of prejudice and passion, in which the judgment of the jury did not participate? Believing thus, we have no hesitation in setting it aside, and awarding a new trial, on the ground alone that the damages are outrageous.

The judgment is reversed and the cause remanded, that a new trial may be had. It is eminently a fit case for the consideration of another jury.

Judgment reversed.

WALKER, Ch. J., dissents.

A CASE

IN THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1866.*

THE CHAMBER OF COMMERCE OF THE CITY OF CHICAGO

v.

JOHN SOLLITT.

1. CONTRACT—*failing to comply with.* If one party to an executory contract induces the other to believe that he has withdrawn from the contract, the other contracting party need not wait until the day of performance before making new arrangements; nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency.

2. Hence, where a carpenter had contracted to construct the wood work of a building at a stipulated price, and at a fixed time, and before the time arrived for him to begin, he wrote to the other party announcing his entire inability to perform, except on certain new conditions. They were not bound to wait until the arrival of the very day for his commencement of the work, before providing for the contingency of his failure.

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* The following case was unavoidably omitted from the reports of the term at which it was decided.

3. And where, in such a case, the other party at once notified the carpenter that they should not accede to his new conditions, but should contract with other parties, and charge the losses to him, and he remained silent, making no objection, and showing no willingness to proceed with the work himself, they were fully justified in treating the contract as abandoned by him.

APPEAL from the Superior Court of Chicago; Hon. JOHN A. JAMESON, Judge, presiding.

This was an action of assumpsit brought by the Chamber of Commerce against Sollitt, for damages for the non performance of a contract for the carpenter work on a building. This contract was made June 30, 1864. On the 13th of July, following, Sollitt notified the building committee of his entire inability to comply with his contract, in a letter which appears at length in the opinion. The committee at once informed him that they should hold him responsible on his contract; that letter is also quoted in the opinion. The action was for damages for the non-performance of the contract. There was a plea of the general issue, a trial by a jury, and a verdict.

Messrs. ARRINGTON & DENT, for the appellant.

1. This case rests on the legal principle, now thoroughly established, that, where one party to a contract gives notice that he will not or can not perform it, the other party may take him at his word, and employ others to perform the same service, and hold the party in default responsible. *Cort* v. *Ambergate, etc.*, R. W., 6 Eng. Law & Eq. 230; *Planche* v. *Colburn*, 8 Bingh. 14; *Masterson* v. *Mayor of Brooklyn*, 7 Hill, 61. But especially see *Hockster* v. *De Latour*, 20 Eng. Law & Eq. 157.

2. The silence of Sollitt was an acquiescence in the construction which the plaintiff put upon his previous notice of refusal, as well as in the line of conduct which the plaintiff declared an intention to adopt in relation to the refusal. 1 Greenl. Evid. 197.

Messrs. SCAMMON, MCCAGG & FULLER, for the appellee.

Having re-let the work before the defendant, as the jury decided, refused or neglected to perform it, the plaintiff has

no cause of action. 2 Pars. on Cont. (new ed.) 677–679, and notes.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The Chamber of Commerce of Chicago employed Sollitt to do the carpenters' work on their building. Before the time had arrived for commencing work, he addressed to them the following letter:

"CHICAGO, July 13, 1864.

"Gentlemen of the Building Committee,

"Chamber of Commerce —

"It is with the deepest regret, that I am obliged, from the force of circumstances, to announce to you my entire inability to proceed with my contract for Chamber of Commerce building as the matter now stands, which is briefly thus:

"In a very short time after I had signed the contract for the work, and before I had time to purchase any lumber for it, or even to make arrangement for doing so, lumber advanced in value $3 or $4 per M., and is now $5 higher on an average than it was at that time, making an absolute loss to me of fully $3,500 in that article alone.

"I do not wish to be understood as declining to go on with the work, as I intend always to fulfil my contracts both in letter and spirit; but under the present extraordinary state of public affairs, and knowing my own inability to fulfil it without some assistance from you, I make bold to ask of you to make good to me the loss I shall sustain on the lumber, which is clearly, to my mind, $3,500. This sum will, beyond all question, if public affairs remain as they now are, be a dead loss to me, and, with the risk I assume in the other parts of the work, places me in a very peculiar situation.

"I would therefore respectfully ask of you, gentlemen, that you advance me the sum of three thousand five hundred dollars, to enable me to purchase the lumber, and if no improvement in public affairs should take place until the work is finished, that

you consider said advance as a part of the contract, making the sum to be paid me $45,500.

"Hoping you will give the above matter your favorable consideration,

"I remain, gentlemen,

"Yours very respectfully,

"JOHN SOLLITT."

To this letter they replied as follows:

"CHICAGO, July 13, 1864.

"JOHN SOLLITT, ESQ.:

"DEAR SIR—I am desired, by the Chamber of Commerce, to notify you that your communication of this date to them was duly received and considered, and unanimously rejected.

"Also, I am directed by them to notify you, that you proceed with the work, according to the terms of the contract made by you with the Chamber of Commerce. And in the event of your neglect so to do, to procure the work to be done, and the materials to be purchased by other parties, charging the expenses thereof to you.

"I am, respectfully,

"EDWARD BURLING,

"*Architect for Chamber of Commerce.*"

The architect saw Sollitt almost daily after delivering to him this note, but he never manifested any willingness or readiness to proceed with the work. A few days after, by the direction of the appellants, the architect made a contract with new builders. Sollitt was told of this by the architect, and made no objection, nor did he offer to proceed with his contract; and before this, when told by the architect, verbally, that the Chamber would not entertain his communication, he said he could not go on with the work.

It can not with any reason be insisted, that the appellants were under obligation to wait until the arrival of the very day for the commencement of appellee's work, before providing for the contingency of his failure. This might have involved them in great

delay and expense. They had received a letter from him emphatically announcing his entire inability to perform, except on certain new conditions. This letter, notwithstanding the qualifying phrase at the beginning of the third paragraph, they were authorized as prudent men to regard as indicating an intention to abandon the contract. When they replied, declining to accede to his proposed conditions, and advising him that they should contract with other parties and charge the losses to him, and he remained silent, making no objection to their contracting with others, nor manifesting any willingness to proceed with the work himself, they were fully justified in treating his course as a withdrawal from the contract. If he knew, that in consequence of his first letter to them, and his failure to reply to their note declining his new conditions, they were about entering into a new contract, at an advanced price, with other builders, and if he really intended to go on with his contract under its original terms, good faith required that he should at once make known such intention to the appellants. If he failed to do so, and permitted them to act on the belief, induced by himself, that he would not perform, he can not now be permitted to insist that he was ready to perform, or that the contract was rescinded by consent. All this is undoubted law, and the sixth instruction for plaintiff, which substantially embodies it, should have been given. If one party to an executory contract induces the other to believe that he has withdrawn from the contract, the other contracting party need not wait until the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency. *Cort* v. *Ambergate*, 6 Eng. L. and Eq. 230; *Hockster* v. *De Latour*, 20 ib. 157; *Planche* v. *Colburn*, 8 Bing. 14; *Fox* v. *Kitton*, 19 Ill. 517.

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2. So where a party had obtained a judgment against a railroad company, and upon the road being sold, the legislature incorporated the purchasers, making it a condition precedent to their exercise of any rights under the charter, that they should pay the judgments rendered against the former company, but provided no specific remedy therefor, it was *held*, the common law would provide a remedy by action of debt on the judgment. Ibid. 200.

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ADMINISTRATION OF ESTATES.

ADMINISTRATOR'S SALE OF LAND.

1. *Administrators cannot purchase at their own sale.* The purchase of real estate belonging to the deceased by an administrator, through the

ADMINISTRATION OF ESTATES.

ADMINISTRATOR'S SALE OF LAND. *Continued.*

interposition of a third party, at his own sale, is fraudulent *per se;* and it matters not that the sale was at public auction for a fair price, and made through the medium of a third party as the bidder, and to whom the administrator conveys. *Miles et al.* v. *Wheeler et al.* 123.

2. The law forbids administrators, executors and others sustaining a fiduciary and confidential relation, from dealing on their own account with the thing or person falling within that trust or relationship. It avails nothing to show that the intentions of the administrator were honest, and that there was no fraud in fact. The law shields him from all temptation by the inflexible rule that he cannot buy at his own sale. Ibid. 123.

3. The reason of the rule is, that the interests of the buyer and seller of the same property are necessarily antagonistic, and the only safe rule is one which absolutely forbids a trustee to occupy two positions inconsistent with each other. Ibid. 123.

ADMISSIONS.

BY DEFENDANT IN BILL OF DISCOVERY.

When they will not avail the other party. See CHANCERY, 13.

ADMISSIONS AS EVIDENCE. See EVIDENCE, 5 to 8.

AGENCY.

PAYMENT OF TAXES BY AGENT.

A principal can claim, in support of his color of title, the benefit of taxes paid by his agent, without reference to the state of accounts between them. *Rand* v. *Scofield,* 167.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1 to 10.

AMENDMENTS.

AMENDMENT OF SHERIFF'S RETURN.

1. *When allowed, and of notice thereof.* The court may grant leave to a sheriff to amend his return to process either before or after a decree is rendered in the case, and it is not error to grant such leave without notice to the opposite party. The return is not the service, but only the evidence of it. The officer makes the return to process at his peril; if false, he is liable to an action for the false return. *Dunn* v. *Rodgers et al.* 260.

AMENDING A JUDGMENT.

2. *After the term — to what extent allowable.* See JUDGMENTS, 2.

APPEALS.

FROM TRIAL OF RIGHT OF PROPERTY.

1. *Appeal allowed to the plaintiff to one of several executions on a joint trial of the right of property.* A sheriff having two executions, one in favor of E. & Co., the other in favor of P., against F., levied them both

APPEALS. FROM TRIAL TO RIGHT OF PROPERTY. *Continued.*

on the same goods, as the property of F. The property was claimed by the wife of F., as against both executions. A trial of the right of property was had before a sheriff's jury, both causes being tried together; a verdict was rendered in favor of the claimant. Both execution creditors appealed to the Circuit Court. E. & Co. failed to file appeal bond. P. filed his bond. The case was docketed by the clerk as *Sarah A. F.* v. *E. & Co.* On motion, the appeal as to E. & Co. was dismissed. P. was allowed to docket his appeal and prosecute it separately. To this the claimant objected. *Held*, that, although the trial before the sheriff's jury was carried on as one suit, P. was an independent party to that suit, and his rights were in no degree mixed up with those of E. & Co.; and he could take an appeal to the Circuit Court without regard to the action of E. & Co. in the matter. *Farrell* v. *Patterson*, 52.

2. Where a sheriff levies upon the same property by virtue of two executions in favor of two distinct parties against the same defendant, and the property is claimed by a third party as against both executions, and a joint trial of the right of property is had before a sheriff's jury, and a verdict rendered in favor of the claimant, the plaintiff to either execution has a separate and independent right to an appeal to the Circuit Court, without reference to the action of the other. Ibid. 52.

FROM THE PROBATE COURT.

3. *To the Circuit Court.* An appeal lies to the Circuit Court from an order of the probate court, admitting, or refusing to admit, a will to probate. Such an order is within the express language of the 138th section of the statute of wills. *Andrews et al.* v. *Black et al.* 256.

EVIDENCE ON SUCH APPEALS.

What is admissible. See WILLS, 17 to 20.

APPEALS FROM JUSTICES.

APPORTIONMENT OF COSTS. See COSTS, 1.

APPEARANCE.

WHAT CONSTITUTES AN APPEARANCE.

And of its effect. Where a stipulation in a suit in chancery states that "the parties came by their solicitors" and agreed to a change of venue, it embraces all the parties, and renders any inquiry as to the sufficiency of the publication as to a portion of the defendants, unnecessary. *Radcliff et al.* v. *Noyes*, 318.

APPURTENANCES.

WHAT WILL PASS THEREBY. See CONVEYANCES, 1, 2, 3.

ARREST.

WHO MAY MAKE AN ARREST.

Where a crime has been committed. See FALSE IMPRISONMENT, 1, 2, 3.

ASSESSMENT.

FOR TAXATION. See TAXES AND TAX TITLES, 18 to 25.

ASSESSMENT OF DAMAGES.

BY THE COURT.

1. *When allowable.* The rule is well settled, that in an action of debt upon a judgment record, for a sum certain, the damages may be computed by the court, without the intervention of a jury. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.*, 201.

2. Under the act of 1863, in all cases of judgment rendered by default, the court is allowed to hear the evidence and assess the damages unless a jury is demanded. Ibid. 201.

ASSIGNMENT.

INDORSEMENT IN BLANK.

1. *Payee who assigns in blank not a guarantor.* An indorsement in blank by the payee of a promissory note does not authorize the indorsee, or other person, through whose hands the note may pass, to write a *guaranty* over such indorsement. *Dietrich* v. *Mitchell*, 40.

2. *Presumption from indorsement in blank.* If the name of a payee is found on the back of a note, the presumption, in this State, in the absence of proof, is, that he placed it there as an assignor, with a view to assume the liabilities of an assignor under our statute. If it be sought to charge him as a guarantor, the plaintiff must show, that he contracted as guarantor. Ibid. 40.

3. But if a stranger indorse a note in blank, at the time of its execution, he is presumed to indorse it as guarantor. Ibid. 40.

ASSIGNEE OF A JUDGMENT.

4. *Of his rights when deprived of the benefit of the judgment through the action of the assignor.* A, on the 19th of December, 1860, executed his note with surety to B, upon the purchase of a certain judgment held by B, against C, who was considered insolvent, but the written assignment thereof was not made until July, 1862, and was then antedated to correspond with the note. At the date of this assignment, an execution was in the hands of the sheriff upon this judgment, and the attorney for B indorsed upon it a receipt in full, and directed it returned, which was done, whereby A lost all benefit of the judgment. B afterward died, and A paid the amount of his note given for the purchase of the judgment to B's administrator. A then filed his claim against B's estate for the amount of such judgment. *Held*, first, that B, by his assignment covenanted, that the judgment against C was unsatisfied, and was for the amount specified therein; second, that, it appearing by the proof that A, at the time he purchased the judgment, knew of a tract of land out of which the amount could have been collected, but that by the act of B's attorney, and the insolvency of C, he had been deprived of all benefit of that for which he had paid value to B, and therefore the estate of B was liable for the amount of A's claim. *Hurd, Admr.*, v. *Slaten*, 348.

ASSIGNMENT. *Continued.*

ASSIGNEE OF NOTE SECURED BY MORTGAGE.

5. *Of his rights where the mortgagor subsequently conveys in fee to the mortgagee, and the property is then sold to a third person.* See MORTGAGES, 4 to 11.

6. *How such assignee shall protect himself against a subsequent release of the mortgage by the mortgagee to the mortgagor.* See same title, 4 to 11.

ASSIGNOR OF A NOTE.

7. *Not a competent witness to impeach the validity of the note.* See WITNESS, 4, 5.

ATTACHMENT.

LEVY OUT OF THE COUNTY.

1. *When the officer may pursue the defendant beyond the limits of his county.* Under the statute, the officer having a writ of attachment to execute, may, if the defendant is in the act of removing his property, pursue it, and make a levy in any county in this State. But where the defendant had, several days before the suing out of the writ, removed his property to another county, and he swears that he was not removing his property, proof that he has been negotiating to form a partnership in Missouri will not create a presumption that he was removing it, and a levy made in that county, on a writ from the county from which the property has been removed, by the sheriff of that county, will not be sustained. *House* v. *Hamilton*, 185.

2. To acquire jurisdiction by the court issuing the writ, there must be service on the defendant or a levy on property in the county from which the writ issues, unless the defendant is in the act of removing his property, when the officer may pursue it, and levy in another county. But, where the writ is issued to the sheriff of one county, and he goes into another and levies on property which is not being removed, the levy is unauthorized, and the court fails to acquire jurisdiction. Ibid. 185.

3. *Remedy, where a levy was improperly made out of the county.* See MOTION, 2.

ATTORNEY AT LAW.

PRESUMPTION AS TO HIS AUTHORITY.

1. *To prosecute a suit.* If, in a suit upon a promissory note, an attorney of this court appears, and has possession of the note sued upon, the inference is, that he has authority to conduct such suit. *Harris* v. *Galbraith et al.* 309.

WANT OF AUTHORITY TO PROSECUTE SUIT.

2. *Defense is at law, not in chancery.* See CHANCERY, 4

PRIVILEGED COMMUNICATIONS.

3. *What constitute.* An attorney cannot be compelled to testify as to whether a promissory note was indorsed when placed in his hands for collection. The privilege extends not only to what the attorney hears, but what he sees, from his situation as attorney. *Dietrich* v. *Mitchell*, 40.

ATTORNEY AT LAW. *Continued.*

ATTORNEY AND CLIENT.

4. *When the relation ends — subsequent acts of attorney.* An attorney employed to collect a debt, prosecuted suit, which resulted in a sale of land upon execution. After the time for redemption had expired, he received and paid the redemption money to the plaintiff in execution, who before that time had transferred the certificate. *Held*, that the relation of attorney and client ended after the time for redemption expired, and that the attorney could do no act in the matter without new authority; *held*, also, that the attorney was liable to the defendant in execution for the money so received. *McLain* v. *Watkins*, 24.

MODE OF ARGUING A CAUSE.

Privileges of counsel in that regard. See PRACTICE, 4.

ATTORNEY'S FEE.

DAMAGES ON DISSOLVING INJUNCTION.

Attorney's fee may be included. *See* INJUNCTIONS, 10.

BANKS AND BANKERS.

WHAT CONSTITUTES A BANKER.

1. *The same as a money-changer.* The term "banker" includes all the business of a money-changer; and this court understands the term money-changer in the same sense as defined by Webster, — "a broker who deals in money, or exchanges." *Hinckley* v. *City of Belleville*, 183.

2. The buying and selling of uncurrent funds, exchanging one kind of money for another, or the transacting of any kind of business included in the business of a money-changer, is equally a part of the business of a private banker, as carried on within this State. Ibid. 183.

LICENSE TO "BANKERS."

3. *Power of cities.* When the charter of a city empowered its council to tax, regulate and license bankers, money-changers, and certain other tradesmen, and the city council, by virtue thereof, passed an ordinance requiring bankers to take out a license, — *held*, upon the question, as to whether the council possessed such power, the agreed case merely describing the party as a banker, without particularizing the kinds of business transacted by him, that the term banker as thus used, comprehends the various kinds of business ordinarily carried on by bankers in this State, and can be required to take out a license under that provision of the charter which applies to money-changers. Ibid. 183.

RIGHTS OF DEPOSITORS.

4. *As to character of funds deposited.* Where a party who keeps an account with a banking house, deposits funds, which are at the time current, he has a right to insist on payment in current funds, although the funds deposited have in the mean time become depreciated. *Willetts* v. *Paine*, 432.

BANKS AND BANKERS. RIGHTS OF DEPOSITORS. *Continued.*

5. If bank bills are deposited as depreciated paper, the depositor has no right to draw for par funds, or expect payment of a check thus drawn. *Willetts* v. *Paine*, 432.

SET-OFF AGAINST HOLDER OF A CHECK.

Not allowable. See SET-OFF, 1.

TAXATION OF NATIONAL BANKS. See TAXES AND TAX TITLES, 13.

BILLS OF DISCOVERY. See CHANCERY, 12, 13.

BLANK INDORSEMENTS.

EFFECT THEREOF.

When made by the payee of a note, or by a stranger. See ASSIGNMENT 1, 2, 3.

BONDS.

REPLEVIN BOND. See REPLEVIN, 1, 2.

GUARDIAN'S BOND.

Presumption as to its sufficiency. See GUARDIAN AND WARD, 1.

BOUNTIES TO SOLDIERS.

POWER OF COUNTIES.

With and without statutory authority. See TAXES, etc. 1 to 8.

BURDEN OF PROOF. See EVIDENCE, 22 to 27.

CARRIERS.

RIGHT OF CONSIGNOR.

To change the destination of goods while in transitu, and duty of the carrier to obey his direction. See CONSIGNOR — CONSIGNEE, 1, 2.

CHANCERY.

JURISDICTION.

1. *In cases to recover possession of land held adversely.* A bill in chancery cannot be maintained, which simply seeks to recover the possession of land held adversely. In such a case, a court of equity has no jurisdiction. *Green et al.* v. *Spring*, 280.

2. *In what cases equity will so decree.* A court of chancery will only decree an adverse claimant to deliver possession to the rightful owner, when such relief is incidental to the main object of the bill, and when the power of the court has been invoked for some purpose that belongs to its legitimate jurisdiction. Ibid. 280.

3. *When there is a defense at law.* Where a party has a legal defense to an action at law, he must avail himself of it in such suit. *Harris* v. *Galbraith et al.* 309.

4. *Want of authority in attorney.* That an attorney had no authority to prosecute the suit at law, affords no ground of equitable relief; such question must be determined in the court of law, and not of equity Ibid. 309.

CHANCERY. *Continued.*

SPECIFIC PERFORMANCE.

5. A conveyed to B land of the value of $2,000, in consideration that B should pay the debts of A, amounting to about $600, and, also, convey one-half the land to C, a minor son of A, upon his arriving of age; or pay to C $800 upon C's paying to B one-half the amount paid by B of A's debts. B paid nearly $600 of A's debts, and sold certain fixtures upon the land, but upon C attaining his majority, B refused to convey half the land or pay the $800, whereupon C filed his bill to compel a specific performance of the contract. *Held*, that B was under no obligation to convey the land until C had refunded to him one-half of the amount paid upon A's debts, it being optional with B whether he convey the land or pay the stipulated amount. *Ridgely* v. *Clodfelter*, 195.

6. But B having denied his obligation to make the conveyance, was thereby liable to C for the $800, less a moiety of the debts paid by him; such balance due, in the event of B's refusal to convey, being a part of the consideration for the conveyance by A to him. Ibid. 195.

7. B having pleaded the statute of frauds as to that portion of the agreement relative to the conveyance of the land, it having been verbal, thereby exercised his option not to make the conveyance, and such denial of the validity of the agreement to convey renders B liable to C for $800, less one-half of the amount paid upon A's debts. Ibid. 195.

8. In such case it was not error for the court to order an account to be stated between the parties, and render a decree for the balance found to be due, and it appearing by such decree that substantial justice had been done, it will not be disturbed. Ibid. 195.

9. *On parol partition between tenants in common.* In case of a parol partition of land between tenants in common, followed by a several possession, while the legal title might not be considered as having passed, unless after a possession sufficiently long to justify the presumption of a deed, yet, each co-tenant would stand seized of the legal title of one-half of his allotment and the equitable title to the other half, and could compel from his co-tenant a conveyance according to the terms of the partition. *Tomlin* v. *Hilyard*, 300.

10. *Degree of proof required in such case.* A mere severance of possession between tenants in common, may be inferred from far less proof than would be required to show a sale of land to a stranger. Ibid. 300.

11. *Waiver of strict performance.* Where time was not made the essence of a contract, and there was an offer to perform in a few days after maturity, and a refusal to accept any thing but gold or silver, — *held*, that the party whose duty it was to perform was not chargeable with laches, and even if time had been made of the essence of the contract, the refusal waived a strict performance. *Hanna* v. *Ratekin*, 462.

BILLS OF DISCOVERY.

12. *By a defendant in a suit at law — must first plead.* The question, whether a party is entitled to a discovery, against one who is prosecuting

CHANCERY. BILLS OF DISCOVERY. *Continued.*

him in an action at law, cannot be determined until he has filed his plea to such action divulging the character of his defense. *Harris* v. *Galbraith et al.* 309.

13. *Admissions of no avail.* And, in such case, there being no issue in the action at law, should the defendant admit the allegations of the bill, the complainant could not avail himself of such admissions. Ibid. 309.

CREDITOR'S BILLS.

14. *Remedy at law must first be exhausted.* Where a security pays the debt, he has no right to come into a court of chancery, in the first instance, seeking to subject the assets of the principal to the payment of his debt. Chancery has no jurisdiction in any such case. The remedy of the security is complete and ample at law. *McConnel* v. *Dickson et al.* 100.

15. The rule is inflexible that a creditor must exhaust his remedy at law, before he can come into a court of chancery to reach equitable assets, or set aside a fraudulent conveyance. Ibid. 100.

RESCISSION OF CONTRACTS.

16. *For fraud.* Where A and B agreed to exchange real estate, and A so conducted himself as to induce B to believe that he was acquiring the title to the whole number of lots contained in a certain inclosure, with the exception of one only, and A, after he had received B's deed for the lands proposed to be exchanged by him, refused to convey the whole number of lots so pointed out by B, and contained within the inclosure, but tendered a deed for part of the property, leaving out two of the lots — *held*, that in so acting, A perpetrated a fraud upon B, which a court of equity will relieve against by rescinding the contract. *Underwood* v. *West*, 403.

CROSS-BILL.

17. *When necessary.* To entitle a defendant to affirmative relief he must file a cross-bill. *Hanna* v. *Ratekin*, 462.

18. So a defendant in chancery cannot have relief against usury, except he file a cross-bill. Ibid. 462.

19. In a suit by the assignee of a note to subject to its payment certain premises, which had been mortgaged to the payee of the note to secure the same, it appeared that the complainant, acting under a mistaken idea that he had lost his lien on the mortgaged premises, took a deed for other lands from his assignor, and it was *held*, the defendants could insist that these lands should be applied as a payment on the note, *pro tanto*, without filing a cross-bill for that purpose. *Edgerton et al.* v. *Young et al.* 469.

PRESERVING THE EVIDENCE.

20. *Mode thereof.* In proceedings in chancery the evidence must support the decree, and must be preserved in the record, which may be done by reducing it to writing by the master, or any one else under direction of the court. *Eaton et al.* v. *Sanders et al. Exrs.* 435.

BILL DISMISSED FOR WANT OF EQUITY.

21. It is proper for a court, on its own motion, to dismiss a bill which, on its face, shows no ground for equitable relief. *Harris* v. *Galbraith et al.* 309.

CHANCERY. *Continued.*

SWORN ANSWERS IN CHANCERY.

22. *Degree of evidence required to overcome them.* Where a bill charges a deed, absolute on its face, to be a security for a loan of money, and the answers, under oath, clearly and distinctly deny the allegation, and insist that it was a sale, the answers are evidence and must be overcome by preponderating evidence before relief will be granted. *Taintor* v. *Keys et al.* 333.

A FORMAL HEARING — NOT NECESSARY.

23. *In a proceeding to contest a will.* It is not error for the chancellor to refuse to go through the form of a hearing, upon a bill to contest the validity of a will, where the verdict was supported by the evidence, simply to deny the relief which the jury had found the complainants were not entitled to receive. *Brownfield et al.* v. *Brownfield et al.* 148.

OPENING A DECREE.

24. *Where there has been constructive notice only.* When a defendant in chancery who has only had notice of the suit by publication, and against whom a decree has been rendered, petitions the court under the fifteenth section of the chancery act, to be heard touching the matter of such decree, and also has given notice of such proceedings to the opposite party, it is not error for the court to set aside such decree, where, after such notice and petition filed, the defendant files his answer and also a cross-bill, and decree is rendered upon the cross-bill by default against the complainants in the original bill. *Bruen et al.* v. *Bruen et al.* 408.

25. *Notice thereof — whether necessary.* In such case, by the terms of the statute, notice is not required to be given to the opposite party that a petition will be presented; but this court is of the opinion, that notice should be given before setting aside the original decree, the only condition being, the payment of costs. Ibid. 408.

26. *Time when notice should be given.* The time when such notice should be given is not material, so that the opposite party has it, before the court acts in the matter. The petition may be first filed and notice given afterward Ibid. 408.

DECREE PRO CONFESSO.

Cannot be entered against infants. See INFANTS, 1.

GUARDIAN AD LITEM. See that title, *post.*

DECREE BEFORE ANSWER FOR INFANTS.

Is erroneous. See GUARDIAN AD LITEM, 6.

ANTICIPATING PAYMENT UNDER A WILL.

When a will fixes the time of enjoyment of the property at a remote period, to what extent a court of chancery may anticipate the time. See WILLS, 9.

ADVERSE POSSESSION OF LAND.

In what cases a court of chancery will decree the surrender thereof. See this title, 1, 2.

CHANCERY. *Continued.*

PARTITION OF ESTATES.

Of the character of estate subject to partition. See PARTITION, 1.

CORRECTION OF MISTAKES. See MISTAKES, 1.

CHATTEL MORTGAGES.

MORTGAGOR'S RIGHT OF POSSESSION.

1. *Of its extent, from provisions in the mortgage.* Where a chattel mortgage contains a provision, that, if default shall be made in the payment of the debt, or the mortgagor shall attempt to sell the property, or it shall be levied on under process, or distrained for rent, or he shall attempt to remove the same, or the mortgagee shall be in danger of losing his debt, he may enter upon the premises of the mortgagor and take possession of the same and sell it to raise the money to pay the debt; and that the mortgagor should keep the property insured for a sum sufficient to cover the debt, and keep it in good repair except necessary wear and tear,—*held*, that the mortgage authorized the debtor to retain possession till the debt was due. *Babcock* v. *McFarland*, 381.

MORTGAGEE'S RIGHT OF POSSESSION.

2. *When it must be shown.* A mortgagee of personal property claiming possession, must show himself entitled to it by the terms of the mortgage, and if that provides for possession remaining with the mortgagor until the happening of a default, the mortgagee must show such default. *Fikes* v. *Manchester, Admr.* 379.

3. *What will be considered prima facie right of possession.* In an action of trover brought against a mortgagee for the conversion of the property, where the note, to secure which the mortgage was given, had matured before suit brought, and the property had passed into the possession of the mortgagee, the production of such mortgage and note uncanceled by the mortgagee, is *prima facie* evidence of his right to the possession. Ibid. 379.

4. *Of attempt by, to impeach the consideration — what facts deemed material — of which he must make proof.* And in such case, where the mortgagor sought to impeach the consideration by showing, that the note was given for a less sum of money, and that it was advanced to the mortgagor to be invested for the mortgagee,—*held*, that the due application of the money was a material fact to be established in order to defeat the *prima facie* right of possession in the mortgagee, and that the burden of making such proof devolved upon the mortgagor. Ibid. 379.

CHECKS.

EFFECT OF DRAWING A CHECK.

1. *Right of the holder to the fund.* Where a depositor draws his check on his banker who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to the payee, who might sue for and recover the amount from the banker. And a transfer of the check carries with it the title to the sum named in the check to each successive holder. *Brown* v. *Leckie et al.* 497.

CHECKS. *Continued.*

CERTIFIED AND UNCERTIFIED CHECKS.

2. *Effect of a certified check.* The certifying a check "good," produces no other effect than to give it additional currency by carrying with it the evidence that it is drawn in good faith and its payment will be met, and by lending to it the credit of the drawee in addition to that of the drawer. Beyond this it does not differ from an uncertified check. *Brown* v. *Leckie et al.* 497.

3. *Ultimate liability of the drawer.* Although certified checks pass from hand to hand as money, as cash, still they are not cash, or currency, in the legal sense of that term, and do not lose the characteristics of bills of exchange, and when dishonored, the holder has a right to look to the drawer for payment. As the acceptance of a bill does not discharge the drawer, so neither does the acceptance of a check, manifested by the word "good" placed upon it by the drawee, discharge the drawer. According to authority they rest on the same principles, and in this respect there is no difference. Ibid. 497.

4. *Whether the amount of a certified check should be charged up at the time of certifying.* It can make no difference if the drawer is charged with the amount of the check, when the drawee indorses it "good." According to general usage the banker expects to pay the check out of the funds of the drawer in his hands, and makes a memorandum, or takes some other course by which he will not permit the amount necessary to meet it to be anticipated, and this is understood by the drawer and the payee. It therefore does not matter whether it is actually charged up at the time, as in either case the funds pass from the control of the drawer Ibid. 497.

SET-OFF BY A BANKER.

5. *Against the holder of a check — not allowable.* See SET-OFF, 1.

LACHES OF THE HOLDER.

6. *Where it discharges the drawer.* Where the holder of a check neglects to present it for payment until twenty-five days after it is drawn, during which time the drawees fail, he cannot have recourse on the drawer unless he shows, that no loss occurred to the drawer through such delay. *Willetts* v. *Paine*, 432.

7. Where a depositor having funds in a bank, gives a check, which the holder neglects to present for payment within a reasonable time, he cannot be held liable for non-payment in current funds, unless the holder shows not merely, that the funds on deposit were depreciated at the date of the check, but that they were depreciated at the time of deposit, and that therefore the drawer had no right to draw the check, or to expect its payment in current funds. Ibid. 432.

See BANKS AND BANKERS.

CHENOA, TOWN OF.

ITS POWERS.

To prohibit by ordinance, the obstruction of its streets, and impose penalties therefor. See CORPORATIONS, 5.

CHURCHES AND CHURCH PROPERTY.

CHURCHES PROTECTED IN THE USE OF THEIR PROPERTY.

1. *As to the manner of its use.* Where property is held by trustees for the exclusive use of a particular organization, that body have the right to enjoy it, according to the usages of the church. Even the trustees, much less others, have no power to pervert it to other uses, except in the usual mode of transferring such property. And any attempt to do so may be restrained. Such a body has the right to use it for the purpose of worship, according to the rules for the government of the church. And they have the right to have such worship performed in the manner and by persons designated by the rules and tenets of the church. *Trustees of First Congregational Church* v. *Stewart*, 81.

2. Other persons cannot lawfully intrude upon such rights. Persons not selected in the mode prescribed by the regulations for the church government, have no right to force themselves into the church, and officiate or conduct the religious exercises; and any one doing so acts in violation of law. Ibid. 81.

REMEDY BY INJUNCTION.

3. *Where a clergyman intrudes himself into a church.* Where it appears that a party has no right to officiate as the minister of the church, and has not been engaged for the purpose, and that he is determined to do so in future unless prevented by force, he may be restrained from the performance of such acts. And, notwithstanding there may be a legal remedy, still, it is not adequate to afford complete relief, as there is no measure of the damages sustained by being deprived of the privilege of worshiping as they prefer. A recovery for the trespass would not cover the whole amount of the damages sustained. Ibid. 81.

4. A congregation of religious persons cannot be forced to accept the ministrations of a clergyman not chosen according to the usages of their church, and when a person attempts to force himself upon them they may maintain a bill to restrain such acts. Ibid 81.

CITIES AND TOWNS. See CORPORATIONS, 4 to 12.

COLOR OF TITLE. See LIMITATIONS, 6, 7, 8.

COMMISSIONER OF GENERAL LAND OFFICE.

OF HIS POWERS.

Cannot superadd conditions to pre-emption rights, beyond those required by law. See PRE-EMPTION, 1, 2, 3.

COMPUTATION OF TIME.

UNDER THE PRE-EMPTION LAWS. See PRE-EMPTION, 5, 6.

CONDITION PRECEDENT. See CONTRACTS, 14.

CONFLICT OF LAWS.

CONSTRUCTION OF STATE LAWS.

Belongs to the State courts. The construction of State laws, when they do not interfere with the Constitution or laws of the United States, belongs to the State courts. *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 339.

CONSIDERATION.

DEED FROM PARENT TO CHILD.

1. *Consideration not material.* Where a father-in-law makes a deed to his son-in-law, to be held as an escrow until after the death of the grantor before delivery, with the agreement, that the grantee pay a price fixed by them, and that the grantee and wife shall reside near him, and he shall render assistance and contribute to the comfort of the grantor and his wife so long as they live, courts will not be rigid in scrutinizing the relative value of the property and the money paid as the consideration. The owner of property has the legal right to dispose of it as he may choose, and may distribute it among his children during his life, instead of by will, and if in doing so, he makes a part of his heirs the recipients of his bounty beyond others, the remaining heirs have no legal right to complain. *Clearwater et al.* v. *Kimler et al.* 273.

NATURAL AFFECTION.

2. *No consideration for a promissory note.* A plea to an action on a promissory note, which sets forth facts showing that it was given with no other consideration than that of natural affection, presents an unquestionable defense, when pleaded as an original want of consideration. *Kirkpatrick et al.* v. *Taylor, Admr.* 207.

3. *Natural affection sufficient for a deed, but not for an executory contract.* The law is well settled, that natural affection constitutes a valid consideration for a deed, but not for an executory contract. Ibid. 207.

PLEA AS TO CONSIDERATION.

As to a want of consideration, or a failure thereof. See PLEADING 8 to 11.

CONSIDERATION OF WRITTEN CONTRACTS.

May be impeached by parol. See EVIDENCE, 3.

IMPEACHING CONSIDERATION OF A NOTE.

Burden of proof. See CHATTEL MORTGAGES, 4.

Sufficiency of proof. See same title, 3.

IN AN ACTION ON A JUDGMENT.

No consideration need be averred or proved. See PLEADING, 2.

OF A NEW CONSIDERATION.

Whether necessary. See CONTRACTS, 10.

CONSIGNOR — CONSIGNEE.

RIGHT OF CONSIGNOR.

1. *To change the destination of property while in transitu.* A consignor of property *in transitu* has the right to direct a change in its destination,

CONSIGNOR — CONSIGNEE. RIGHT OF CONSIGNOR. *Continued.*
and have it delivered to a different consignee, and the carrier is bound to obey such direction. *Strahan et al.* v. *The Union Stock Yard and Transit Co.* 424.

LIEN OF CONSIGNEE.

3. *When it attaches.* And when in such case the destination is changed, and the consignee, from whom the consignment is taken, does not obtain possession of the property before notice is given to the carrier that the property is to be delivered to another and different consignee, such first named consignee acquires no lien on the property, for any general balance against the consignor. Ibid. 424.

CONSTITUTIONAL LAW.

TAXATION TO PAY SOLDIERS' BOUNTIES. See TAXES AND TAX TITLES, 1, 2.

CONTINUANCE.

DILIGENCE REQUIRED.

1. *Witness residing in another State.* Where a cause has been pending in a court in this State for eighteen months, and a witness resides in another State when the suit is brought, the party desiring to use his evidence should, without unreasonable delay, proceed to take his deposition. He has no right to rely upon his promise to attend at the trial, and if he does, it is at his own peril. *Gass et al.* v. *Howard*, 223.

2. Where a suit had been brought in February, and a witness resided at the time in the State of Indiana, and so continued for some fifteen months and no efforts appear to have been made to take his deposition, and an affidavit stating that the witness had left for Oregon by way of the plains some four months previous to the application for a continuance, and the affidavit states that the party had no knowledge of his intention of leaving until he had gone, but that witness promises to return soon after reaching Oregon, and if he should not the party expects to take his deposition before the next term of court; and the affidavit showed no other diligence, — *held*, that such an affidavit is not sufficient to entitle the party to a continuance. Ibid. 223.

CONTINUANCE OF RECOGNIZANCE.

By operation of law. See RECOGNIZANCE, 1.

CONTRACTS.

WHAT CONSTITUTES A CONTRACT.

1. *And who may have a remedy thereon.* Where a party had recovered a judgment against a railroad company, and upon a sale of the road the purchasers were incorporated by an act of the Legislature, it being a condition precedent to the exercise of any rights under the charter, that the new company should pay the judgments against the old company, — *held*, that the owner of the judgment could have his action of debt thereon against the new company, who, by the terms of their charter, were bound

CONTRACTS. WHAT CONSTITUTES A CONTRACT. *Continued.*

for its satisfaction. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.* 200.

MENTAL CAPACITY TO CONTRACT.

2. Where a bill is filed by a part of the heirs of a deceased person, to set aside a deed of conveyance to another heir, on the ground, that the grantor was mentally too weak and imbecile to be capable of executing such an instrument, and it appears from the evidence, that he manifested prudence and judgment in determining the best mode of having the conveyance take effect after his death, it will not be presumed, that he was mentally too weak to execute such a conveyance. *Clearwater et al.* v. *Kimler et al.* 272.

CONSTRUCTION OF CONTRACTS.

3. *Contracts will be construed according to the intention of the parties.* The rule is well established, that contracts should receive a reasonable interpretation according to the intention of the parties entering into them, if the intention can be gathered from the language employed. *Streeter* v. *Streeter,* 156.

4. *Contracts to be construed by the court — effect of misinterpretation of words used.* It is a legal duty pertaining exclusively to the court, to put its own construction upon contracts in evidence before it, and if in so doing a word is misinterpreted, material to the contract, though it would be error, yet it might not of itself be sufficient ground on which to set aside a verdict, unless the jury were thereby misled. Ibid. 157.

5. *Meaning of words used in — to be given by the court — except words of art or science.* It is the province of the court to give the meaning of words used in a contract in evidence before it, unless they are technical expressions, or terms of art, or science, which experts alone can explain; and it is error to leave such interpretation to be made by a jury. Ibid. 157.

6. *Testimony of experts — on proof of usage — when not admissible to show what a contract means.* See EVIDENCE, 18 to 21.

OF THE MEANING OF CERTAIN WORDS.

7. "*Immediately,*" *definition of.* The word "immediately" is not to be used in the same sense, or to convey the same meaning, as the word "practicably." The former includes the latter, but not so the latter the former. Ibid. 157.

8. "*Practicably.*" The word "practicable" means that which may be done, practiced, or accomplished, — that which is performable, feasible, possible; and the adverb "practicably" means in a practicable manner. Ibid. 157.

CONSTRUCTION OF A GRANT.

9. *In view of the condition of the property.* See CONVEYANCES, 1, 2, 3.

CONTRACTS CONSTRUED.

10. *Whether two instruments are parts of the same contract — and whether a new consideration and stamp are required.* In a suit brought upon the following instrument:

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

"VANDALIA, ILL., April 16, 1864.

'In consideration of sixty-five dollars, to be paid to J. & J. W. Bunn, Springfield, Illinois, I, Charles Capps, hereby agree to make a warranty deed to Isaac Watts to the following described real estate, viz: Lot two, block nine, Gill's west addition, Atlanta, Logan county, Illinois. The above premises having been in law, and if not decided at this date, the above to be a firm contract — said Isaac Watts agreeing to pay all taxes against said real estate, provided the same has not been sold for taxes, and is beyond redemption. If the property has been sold and the time of redemption expired, then the above to be null and void, otherwise to remain in full force and effect — said Capps giving possession on the 7th day of May, 1864 — said Watts, being the plaintiff in the suit against said real estate, hereby agrees to dismiss said suit at his, said Watts', costs.

(Signed) "CHARLES CAPPS,
"E. CAPPS,
"ISAAC WATTS.

"I, E. Capps, guarantee that Charles Capps complies with the above agreement. (Signed) E. CAPPS."

It is *held*, that the signature of Ebenezer Capps to the first contract was placed there as security for Charles Capps, and that the guaranty written below was merely to explain the object of his signature to the first agreement, and required neither a new consideration nor a stamp. *Capps* v. *Watts*, 60.

11. *Contract for surrender of a lease construed.* See LANDLORD AND TENANT, 1, 2.

12. *Condition of a mortgage construed.* See MORTGAGES, 3.

13. *Of a sale on condition.* See SALES, 1.

CONDITION PRECEDENT.

14. A tenant sold upon credit to his landlord, all the crops he had raised on his land, at the price of $500, and agreed to leave the premises in ten days with all his "traps." The tenant did leave, and removed the greater part of his property within the time specified, but left around the premises some geese, shoats, sheep and ducks, for a longer period. The landlord entered and took possession of the crops, but refused to pay, on the ground, that the removal of the tenant with all his property was a condition precedent. *Held*, it was not, and that the purchaser having received value, law and justice both combined in requiring him to pay the amount he agreed. *White* v. *Gillman*, 502.

ABANDONMENT OF CONTRACT.

15. *Rights of the respective parties.* If one party to an executory contract induces the other to believe that he has withdrawn from the contract, the other contracting party need not wait until the day of performance before making new arrangements; nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency. *Chamber of Commerce* v. *Sollitt*, 519

CONTRACTS. ABANDONMENT OF CONTRACT. *Continued.*

16. Hence, where a carpenter had contracted to construct the wood work of a building at a stipulated price, and at a fixed time, and before the time arrived for him to begin, he wrote to the other party announcing his entire inability to perform, except on certain new conditions, they were not bound to wait until the arrival of the very day for his commencement of the work, before providing for the contingency of his failure. *Chamber of Commerce* v. *Sollitt*, 519.

17. And where, in such a case, the other party at once notified the carpenter that they should not accede to his new conditions, but should contract with other parties, and charge the losses to him, and he remained silent, making no objection, and showing no willingness to proceed with the work himself, they were fully justified in treating the contract as abandoned by him. Ibid. 519.

PAROL AGREEMENT.

18. A parol agreement to surrender up a promissory note on the happening of a certain contingency, cannot destroy the effect of the note. *Kirkpatrick et al.* v. *Taylor, Admr.* 207.

ERASURES IN CONTRACTS.

19. *Of their effect.* Where it appeared in evidence that a clause in the printed form of the mortgage was stricken out, which in terms provided that the property might remain with the debtor, before it was executed, this does not change the right, when such appears to have been the intention from the clauses left in the instrument. *Babcock* v. *McFarland*, 381.

OF SUBSCRIPTIONS.

When binding — and herein, of a verbal promise of the character of a subscription. See SUBSCRIPTION, 1, 2, 3.

OF A PROMISEE OR PAYEE.

What will constitute a person a promisee or payee. See same title, 4.

OF RELATION OF TRUST AND CONFIDENCE.

When a purchaser is bound to disclose facts to his vendor in relation to value of property. See VENDOR AND PURCHASER, 1.

RESCISSION OF CONTRACTS.

In equity — for fraud. See CHANCERY, 16.

WHAT CONSTITUTES A MORTGAGE.

And when a transaction amounts simply to a purchase and resale. See MORTGAGES, 1, 2.

CONVEYANCES.

WHAT PASSES BY A DEED.

1. *As appurtenances, and herein of construing grants in view of the condition of the property.* Where a factory and the land on which it stood with the appurtenances were conveyed, the factory being the subject matter of the grant, all that belonged to the tract conveyed, and over which the grantor had dominion, passed by his deed, under the term "appurtenances," and nothing more. *Bliss et al.* v. *Kennedy et al.* 67.

CONVEYANCES. What passes by a deed. *Continued.*

2. Courts always construe grants, by considering the condition of things at the time the grant was made. *Bliss et al.* v. *Kennedy et al.* 67.

3. Where a grantor conveyed a factory, and the land on which it stood, with its appurtenances, he owning nothing outside of the boundaries of the land conveyed, above or below the factory, he could convey nothing beyond the premises themselves; and therefore no part of a stream above the factory, by which the factory was supplied with water, could pass as appurtenances to it. Ibid. 67.

Of the rights subsequently acquired by grantor.

Whether they will inure to the benefit of the grantee. See VENDOR AND PURCHASER, 2, 3.

Acknowledgment of deeds. See that title, *ante.*

CORPORATIONS.

Charter of railroad — upon condition.

1. *Is a contract, and condition may be enforced.* A, recovered a judgment against the Terre Haute, Alton and St. Louis Railroad company, for work and labor performed for it, and subsequently the road was sold, and its purchasers were, by an act of the legislature, passed February, 1861, incorporated as the St. Louis, Alton and Terre Haute Railroad company, under which they organized, and which act provided, among other things, that, as a condition precedent to its operation, they should pay all unsatisfied judgments which had been recovered against the former company for work and labor done for it. In an action of debt, brought against the St. Louis, Alton and Terre Haute Railroad company, upon this judgment, — *held*, that the company was liable, it having succeeded under said act, to all the corporate powers, privileges and franchises of the Terre Haute, Alton and St. Louis Railroad company, and having assumed in consideration of such grant, to pay and discharge all judgments of such a character, remaining unsatisfied against said company last named. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.* 199.

2. This act of incorporation constituted an agreement between the State and the St. Louis, Alton and Terre Haute Railroad company, by the making of which, the defendant became liable to pay the judgment in question. Ibid. 200.

3. *Remedy for non-performance of condition.* While the State might revoke the grant made to the St. Louis, Alton and Terre Haute Railroad company, because of its exercise of the franchise before condition performed, yet, the act did not design, that judgment creditors should be dependent upon the action of the State in the matter, as such action could not in any way benefit the creditors, or relieve the company from the obligations it had assumed. Ibid. 200.

Municipal corporations.

4. *Irregularities in organization — cured by legislation.* Where an act of the general assembly provides that all acts performed for the purpose of incorporating a town shall be valid, and that all ordinances which it may

CORPORATIONS. MUNICIPAL CORPORATIONS. *Continued.*

have adopted, not repugnant to the Constitution of this State or the United States, shall be binding, such legislation recognizes the existence of the corporate body, and cures any irregularities that may have occurred in its organization. *Toledo, Peoria and Warsaw Railway Co.* v. *Town of Chenoa*, 209.

5. *Obstructing streets — power of towns and cities to punish therefor.* By the act of February 10, 1849, it is declared, that the corporate authorities of all towns and cities incorporated under the general law or under special charters, shall have the same powers as are conferred on the cities of Quincy and Springfield, by their charters and amendments thereto. The charter of Springfield confers power to open, widen, establish, grade or otherwise improve and keep in repair, streets, avenues, lanes and alleys; and to pass all ordinances necessary to carry into effect the powers conferred by the charter. *Held*, that this conferred upon the town of Chenoa, power to adopt an ordinance punishing by fine, any person who might obstruct a public street within its limits. Ibid. 209.

6. *Extent of penalty that can be imposed by cities and towns.* A town incorporated under the general law, and having the powers conferred by the charters of the cities of Springfield and Quincy, may impose a fine for a breach of their ordinances, exceeding five dollars. The power to impose penalties and fines is not limited in amount by those charters. Ibid. 209.

7. *Extent of recovery before a justice of the peace.* But the Constitution prevents justices of the peace from trying cases involving fines to a greater amount than $100. Ibid. 210.

8. *An ordinance must be in force at the time of the alleged breach.* Where a party is prosecuted for an alleged breach of a town ordinance, and the ordinance which prohibits the act done, prescribes no penalty, but refers for the penalty to another ordinance which was passed after the alleged breach was committed, no recovery can be had. Ibid. 210.

9. *Power of counties to pay bounties to soldiers, with and without statutory authority.* See TAXES, &c. 6, 7, 8.

10. *Powers of towns in regard to license.* See LICENSE, 1, 2.

11. *Enjoining municipal corporations against an abuse of their franchises.* See INJUNCTIONS, 2.

12. *Requisites of a city ordinance.* See ORDINANCE, 1.

COSTS.

ON APPEALS FROM JUSTICES.

1. *Apportionment thereof.* In apportioning costs under our statute, in case of an appeal from a judgment of a justice of the peace, the Circuit Court must take a view of the whole case, and ascertain where the justice of it is, and so apportion the costs. *Beckman et al.* v. *Kreamer et al.* 447.

SECURITY FOR COSTS.

2. *Time to object for want of it.* See PRACTICE, 10.

COUNTIES.
TAXATION TO PAY BOUNTIES TO SOLDIERS.
Of the power of counties, with and without statutory authority. See TAXES, &c., 6, 7, 8.

COUNTY OFFICERS.
NOTARY PUBLIC.
Is a county officer. See ACKNOWLEDGMENT OF DEEDS, 2.

COUNTY TAX.
WHAT CONSTITUTES.
Tax levied by a county for military purposes, is a county tax. See COUNTY TREASURER, 1.

COUNTY TREASURER.
OF HIS FEES.
Commission on money which did not, but ought to have, come into his hands. Under the act of 1861, "to encourage the formation and equipment of volunteers," the county of McLean assessed a special tax, and its board of supervisors appointed a disbursing agent, as required by the law, and also made an order directing town collectors to pay over to him this war tax, which was done, such agent receiving and disbursing the fund. In an action against the county treasurer on his bond, to recover two per cent of this tax which he had retained as commissions, *held*, that the tax thus assessed was a county tax, and, as such, should have been paid to the county treasurer, and not to the agent, as ordered by the supervisors, they having no legal power to make such order. That it must be assumed, that the treasurer would have received and disbursed the fund if he had been permitted, and having the legal right so to do, he must be considered as having done it, and entitled to his commissions therefor as provided by law. *Fell* v. *Supervisors of McLean Co.* 216.

COVERTURE.
HOW TO AVAIL AS A DEFENSE. See PLEADING, 12, 18.

CREDITORS.
PAYMENT OF DEBT BY A SURETY.
Of his relative rights as a creditor. See SURETY, 4.

CREDITORS' BILLS. See CHANCERY, 14, 15.

CRIMINAL LAW.
LARCENY.
1. *What constitutes.* If the owner of goods alleged to have been stolen, voluntarily parts with the possession and title, then, neither the taking nor conversion is felonious. It amounts simply to a fraud. *Stinson et al.* v. *The People*, 397.

CRIMINAL LAW. LARCENY. *Continued.*

2. But, if he parts with the possession only, expecting the identical thing will be returned, or that it shall be disposed of on his account, or in a particular way as directed or agreed upon for his benefit, then the title to the goods does not pass, and they may be feloniously converted, and the bailee be guilty of a larceny, if obtained with that intent. *Stinson et al.* v. *The People*, 397.

3. A, B, C and D, were passengers on a railroad train from Detroit to Chicago. D being a stranger to the others, and while the train was in the State of Indiana, A wagered a certain sum with D, and, thereupon, D deposited the amount of his wager in money with B, who was selected as stakeholder, and A deposited an express package purporting to contain an equal amount, but which was afterward discovered to contain nothing but waste paper, whereupon D demanded his money from B, which he refused to pay back. Subsequently A, B and C were arrested in Chicago, upon a charge of larceny, and the money found in the possession of B. *Held*, that the act was a felony. That the conduct of B fully rebutted the idea, that he acted as a mere innocent stakeholder, but, on the contrary, showed collusion with his confederates in the felonious design to deprive D of his money. Ibid. 397.

4. In such case, it was not error for the court to refuse an instruction, that unless the jury believed that the defendants were previously acquainted, and connived together for the purpose of obtaing the money and sharing it between them, they must acquit the defendants. The simple question for the jury was, were the defendants then confederating for the purpose of feloniously obtaining the money, and in what manner was it obtained. Ibid. 398.

LARCENY — WHERE PUNISHABLE.

5. The principle is well settled, that where the original taking is felonious, every act of possession continued under it by the thief is a felonious taking, wherever the thief may be, and to whatever places he carries the stolen property, and he may be there punished for the felony. Ibid. 398.

OF THE IDENTITY OF THE OFFENSE.

6. *As to the manner in which it was committed.* When an indictment for murder charged the offense as having been committed by shooting from a gun by means of powder and shot, proof, that the murder was committed by striking the deceased with a gun upon the head, is inadmissible. *Guedel* v. *The People*, 226.

7. The law requires that a prisoner on trial for murder, shall be fully informed by the indictment of the precise nature of the charge against him. Ibid. 226.

8. The mode in which the offense was committed, is an essential part of the indictment; and killing by shooting, and killing by beating upon the head with a gun, are modes of causing death so essentially unlike, that proof of the one mode would be inadmissible under an indictment charging the other. Ibid. 226.

CRIMINAL LAW. *Continued.*

AUTREFOIS ACQUIT.

9. *Where there is no legal jeopardy.* Where a person was indicted for a murder, committed by shooting with powder and shot from a gun, and was acquitted, and was afterward indicted for the same murder, and convicted, and in such second indictment the offense was alleged to have been done by beating upon the head with a gun, — *held*, that the two indictments stated different offenses, and that the acquittal on the first one was no bar to the second, the prisoner never having been in legal jeopardy. *Guedel* v. *The People*, 226.

DAMAGES.

ASSESSMENT OF DAMAGES.

By the court. See ASSESSMENT OF DAMAGES, 1, 2.

LAYING OUT A PUBLIC ROAD.

Mode of adjusting damages. See HIGHWAYS, 2 to 6.

ON DISSOLUTION OF INJUNCTION.

Attorney's fee may be included. See INJUNCTIONS, 10.

EXCESSIVE DAMAGES.

New trial granted therefor. See NEW TRIAL, 3, 4.

DEATH OF JUDGMENT DEBTOR.

HOW TO OBTAIN EXECUTION.

When there is no executor or administrator. See EXECUTIONS, 1.

DEBT.

ON JUDGMENT RECORD.

The action of debt is the proper remedy on a judgment record. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.* 200.

DECREE.

OF COMBINING TWO ITEMS IN ONE.

1. *Whether erroneous.* Where a decree of foreclosure finds the amount of the debt due, and under a provision in the mortgage authorizing a decree for an attorney's fee, and for expenses of the mortgagee in bringing suit, and the master reports an attorney's fee of ten dollars, and the mortgagee two dollars for expenses, which is approved, but the court in rendering the decree, added twelve dollars as an attorney's fee, but nothing for expenses: *Held*, the amount being the same, there was no error in the decree. *Dunn* v. *Rogers et al.* 260.

IMPEACHMENT OF DECREE.

2. *Mode thereof.* A decree cannot be impeached by affidavits alone, unaccompanied by a bill filed for that specific purpose. *Hanna* v. *Ratekin*, 462.

DECREE ON FORECLOSURE.

Against a purchaser of the equity of redemption — should not require him to pay the mortgage debt. See MORTGAGES, 8.

DECREE. *Continued.*

DECREE FOR POSSESSION.

When not proper. See POSSESSION, 1.

GUARDIAN'S APPLICATION TO SELL LAND.

Decree need not fix the precise time of sale. See GUARDIAN AND WARD, 5.

DEFAULT.

DEFAULT FOR WANT OF A PLEA.

After demurrer — assessment of damages. Where a defendant demurs to a declaration, and his demurrer is overruled, and he fails to obtain leave to plead, a default for want of a plea is the necessary consequence. The judgment on the demurrer in such case is, that plaintiff recover his debt, and damages occasioned by detention of the same, to assess which a jury should be called. *Bates et al.* v. *Williams*, 494.

DELEGATED POWERS. See POWERS, 1.

DEMAND.

IN FORCIBLE DETAINER. See FORCIBLE ENTRY AND DETAINER, 1 to 4

DEMURRER.

OF IMMATERIAL AVERMENTS.

Must be objected to by demurrer. See PLEADING, 7.

DEMURRER TO SCI. FA. ON RECOG.

What questions are presented thereby. See RECOGNIZANCE, 2.

DEPOSITORS. See BANKS AND BANKERS, 4, 5.

DESCRIPTION.

LAYING OUT A PUBLIC ROAD.

What a sufficient description. See HIGHWAYS, 1.

DEVISE. See WILLS.

DILIGENCE.

CONTINUANCE.

Diligence required where witness resides in another State. See CONTINUANCE, 1, 2.

DIVORCE.

MUST BE PROVED BY THE RECORD. See EVIDENCE, 16.

JUDICIAL NOTICE NOT TAKEN OF DIVORCE. See JUDICIAL NOTICE, 1.

DOWER.

WHEN BARRED BY RELINQUISHMENT.

Outstanding title. Where a person was recognized to appear and answer to a criminal charge, and, he being joined by his wife, conveyed real estate in fee to his bail, or another, to secure his sureties, and fails to

DOWER. When barred by relinquishment. *Continued.*
appear, and the recognizance is forfeited, and the holder of the title of such land, supposing a city to be entitled to the forfeiture, conveyed the premises to the city in satisfaction of the forfeiture; but the forfeiture being afterward claimed by the school commissioner, and purchased in by both under the execution on the judgment recovered on the recognizance, and the deed was, under the order of court, made to the school commissioner, who conveyed it to another person, and where it appeared, that the person recognized to appear to answer the criminal charge had died,—*held*, in a proceeding instituted by his widow, against the purchaser from the school commissioner, for dower in the premises, that she was estopped by the conveyance of the property by her and her husband to indemnify his sureties, and, that defendant might set that and subsequent conveyances up as an outstanding title to defeat her recovery; that until that title is set aside as fraudulent, or otherwise, she had no claim to dower in the premises. *McKee* v. *Brown*, 131.

Laying out a public road.
Mode of adjusting damages in respect to a dower interest. See HIGHWAYS, 3.

DRAWER.
Drawer of check.
When discharged by laches of holder. See CHECKS, 6, 7.
Drawer of certified check.
His ultimate liability. See CHECKS, 2, 3, 4.

EQUALIZATION OF ASSESSMENTS.
As between townships.
Of the mode thereof. See TAXES, etc. 22 to 25.

ERASURES.
Erasures in contracts.
Of their effect. See CONTRACTS, 19.

ESTOPPEL.
Of admissions.
When they will, and when they will not operate as an estoppel. See EVIDENCE, 5, 6, 7.

Jurisdiction of a court.
When a party is estopped from denying the jurisdiction of a court. See JURISDICTION, 2.

EVIDENCE.
Parol evidence.
1. *Impeachment of certificate of acknowledgment of a deed.* Where the certificate of acknowledgment appears substantially in the form prescribed by the statute, it is conclusive, and can only be impeached for fraud or imposition practiced. *Hill* v. *Bacon*, 477.

EVIDENCE. PAROL EVIDENCE. *Continued.*

2. *Inadmissible to vary terms of a written contract.* In a suit on a promissory note, parol evidence is inadmissible, to show a cotemporaneous verbal agreement, varying the terms of the note. *Harris* v. *Galbraith et al.* 309.

3. *Admissible to impeach consideration.* But parol proof may be received to impeach the consideration of a note. Ibid. 309.

4. *Tax receipts,* like other receipts, are susceptible of explanation upon the question, for whom the taxes were paid. *Rand* v. *Scofield,* 167.

ADMISSIONS.

5. *When they may be disproved — and when they will operate as an estoppel.* Admissions are to go to the jury, but a party making them is at liberty to disprove them, — to show by proof *aliunde* they were not true, or made for a purpose. The jury are to determine what weight should be given to them. *Young* v. *Foute,* 33.

6. Unless admissions have induced a person to act on them, and so alter ing his condition, they may be shown to be untrue; but, if a party has acted on them, they will operate as an estoppel on the party making them. Ibid. 33.

7. In all cases of admissions, it is for the jury to determine the weight to be given to them, for much depends on the accuracy of the memory of the witness, and the circumstances under which the admissions were made. Ibid. 33.

8. *Of credits entered in a bill of particulars.* Where a party files a bill of particulars, embracing many charges, and a credit for a sum as paid, the whole account must be taken together, like an admission of any other kind, and it is for the jury to pass upon it and say what it proves. If the other party introduces the account, he must introduce both charges and credits for the consideration of the jury. *Thompson et al.* v. *Hovey,* 197.

IRRELEVANCY.

9. In an action for an injury sustained through the overturning of a carriage, by reason of a hole made and left in the street by city authorities, evidence that the injured party, during the following winter, went to Cuba, for the more perfect restoration of health, without showing that the change was necessary to a complete recovery — *held* inadmissible and improper, as it would shed no light upon the question in controversy, and would be likely to influence the jury in giving damages. *City of Chicago* v. *Allen et ux.* 496.

ADMISSIBILITY, GENERALLY.

10. *As to the necessity of a rule adopted by a railroad company.* Although the question of the reasonableness of a rule adopted by a railroad company for the regulation of its business is one of law purely, it is proper for the court to admit testimony in regard to the necessity of such rule. *Illinois Central Railroad Co.* v. *Whittemore,* 421.

11. *As to condition of railroad locomotive.* In an action to recover damages, caused by the explosion of a certain locomtive engine, the testimony of the employees of the company using it, that, among them,

EVIDENCE. ADMISSIBILITY, GENERALLY. *Continued.*

such engine had always been considered unsafe, is competent, for the purpose of showing that the person having care of the machinery of the road knew, or might have known, by reasonable diligence, that it was not safe. *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 339.

12. *Amount of steam carried on a former trip.* In this case, the deceased was a brakeman on the road, and it was held, that proof that the engineer had, on a previous trip made on the road, carried more steam than the rules of the company allowed, was inadmissible. Ibid. 339.

OF OPINIONS AND THEORIES.

13. *Circumstances affecting the weight they are entitled to.* Evidence, relating to mere matters of theory and opinion, though often valuable, loses its weight when the witnesses are so circumstanced, that they have a strong interest in propounding one opinion or theory, rather than another. Ibid. 339.

QUESTION OF LAW.

14. *Witness cannot testify as to matter of law.* An interrogatory asking a witness to swear as to a matter, which in part was a question of law, is improper. *Tomlin* v. *Hilyard,* 301.

DEGREE OF PROOF REQUIRED.

15. *In an action qui tam against a railroad,* to recover the penalty for failure to sound a whistle or ring a bell when required by law, it is error to instruct the jury for the plaintiff, "that a preponderance of evidence, only, is required, and that it is not necessary a jury should be satisfied of the guilt of the defendant beyond a reasonable doubt." While the same completeness of proof is not required in such cases, as in cases where life or liberty is in jeopardy, yet there must be a reasonable and well founded belief of the guilt of the defendant, — a very slight preponderance will not suffice. *Toledo, Peoria and Warsaw Railway Co.* v. *Foster,* 480.

PROOF OF A DIVORCE.

16. *Must be by the record.* Proof of a divorce can only be established by the record, unless the fact be properly admitted. *Streeter* v. *Streeter,* 157.

17. *Courts will not take judicial notice of a divorce in another proceeding between the parties.* See JUDICIAL NOTICE, 1.

EXPERTS.

18. *Construction of contracts.* Where evidence is introduced on a trial to show the terms of a contract for the erection of a marble monument, it is error to call other witnesses, who are dealers or workmen in marble, and to ask them, "What, in the trade of a marble dealer, is meant by a contract to erect a monument?" *Sanford* v. *Rawlings,* 92.

19. It is wholly unnecessary to call a workman in marble to prove the legal import of a contract "to erect a monument," or what would be understood by such a contract in the trade, because there could be no

EVIDENCE. EXPERTS. *Continued.*

dispute as to its meaning. The law would attach to this language a precise signification. *Sanford* v. *Rawlings*, 92.

20. What a contract is must be shown by the language and acts of the parties, and not by proving what is the custom of dealers and workmen as to their mode of executing particular contracts. Ibid. 93.

21. It is the province of the court to give the meaning of words used in a contract in evidence before it, unless they are technical expressions, or terms of art, or science, which experts alone can explain. *Streeter* v *Streeter*, 157.

BURDEN OF PROOF.

22. *Of acquiescence of a cestui que trust in the purchase of the trustee at his own sale.* Where, in case of a trustee purchasing at his own sale, the defendant relies upon acquiescence, the burden is upon him of showing notice to the *cestui que trust*, distinct information to him, and acquiescence after that distinct information is communicated. *Miles et al.* v. *Wheeler et al.* 124.

23. This rule is upon the ground, that, the purchase being *prima facie* a fraud and void, it devolves upon the person claiming under it to show whatever he relies upon as taking it out of the rule. Ibid. 124.

24. *Under plea of non est factum.* See PLEADING AND EVIDENCE, 15.

25. *In proceeding to contest a will — presumption in favor of its validity* See WILLS, 14.

26. *Impeaching consideration of a note.* See CHATTEL MORTGAGES, 4

27. *Where a married woman claims the ownership of personal property as against a creditor of her husband.* See MARRIED WOMEN, 4.

JUDICIAL NOTICE.

Of what matters courts will take judicial notice. See JUDICIAL NOTICE

APPLICATION TO ADMIT A WILL TO PROBATE.

What witnesses may testify on such an application, and on an appeal to the Circuit Court. See WILLS, 17 to 20.

PROCEEDING TO CONTEST A WILL.

Of proper evidence as to undue influence upon the testator, of his mental capacity, and of the fact of his signing the will. See WILLS, 21, 22.

WILLS — AUTHENTICATION.

Necessity of proper authentication. See WILLS, 15.

MENTAL CAPACITY TO CONTRACT.

Evidence thereof. See CONTRACTS, 2.

BREACH OF TOWN ORDINANCE.

The ordinance must be in force at the time of the alleged breach. See CORPORATIONS, 8.

SWORN ANSWERS IN CHANCERY.

Degree of evidence required to overcome them. See CHANCERY, 22.

EVIDENCE. *Continued.*

EVIDENCE IN CHANCERY.

How preserved. See CHANCERY, 20.

EVIDENCE OF PARTNERSHIP.

Whether sufficient. See PARTNERSHIP, 6.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILLS OF EXCEPTIONS.

1. *When necessary.* Where the ruling of the court upon a motion to dismiss for want of a proper bond for costs is assigned for error, such a motion only becomes a part of the record and is properly brought before this court by means of a bill of exceptions. *Douglass* v. *Parker et al.* 146.

2. The same rule applies where the errors assigned relate to questions of evidence. Ibid. 146.

EXCESSIVE DAMAGES.

NEW TRIAL GRANTED THEREFOR. See NEW TRIALS, 3, 4.

EXECUTION.

DEATH OF JUDGMENT DEBTOR.

How to obtain execution when there is no executor or administrator. Under the statute authorizing an execution to issue against the property of a deceased judgment debtor, without reviving the judgment, upon giving notice of the existence of the same, to the executor or administrator, *the inference would seem to be*, that, in case there is no executor or administrator, the judgment must be revived against the heirs before an execution can issue. *Littler* v. *The People ex rel. Hargadine*, 189.

EXPERTS. See EVIDENCE, 18 to 21.

FALSE IMPRISONMENT.

JUSTIFICATION THEREFOR.

1. *Who may make an arrest, and under what circumstances.* A private individual may arrest a person guilty of crime, when it is necessary to prevent the escape of the accused, and have him taken before the proper officer for examination. But such a person cannot justify such arrest upon the ground of a suspicion of guilt only — guilt in such a case must be shown. It is otherwise with a peace officer authorized to make arrests, as he may arrest without a warrant where all the facts show that there was strong probable cause to believe that the accused was guilty. *Dodds et al.* v. *Board*, 95.

2. Where a number of persons suspect a person of being guilty of crime, and induce a peace officer to make an arrest, without a warrant, they cannot justify their action by showing probable cause to believe him guilty; to do so, they must show guilt. In such a case the officer would, it seems, be justified. Ibid. 95.

3. Where a crime has been committed, and the party arrested is guilty, and private individuals induce a peace officer to make the arrest, they, as well as the officer will be justified by showing the guilt. Ibid. 95.

FEES.

FEES OF CIRCUIT COURT CLERK.

For entering suit on the docket. The statute makes it the duty of the clerks of the Circuit Courts to prepare and keep a docket of all causes pending in their respective courts, in which shall be entered the names of the parties, the cause of action, and name of the plaintiff's attorney; and to furnish the judge and the bar, at each term, with a copy of the same; and provides, that for this labor the clerk shall be entitled to a fee of ten cents for entering each suit on the docket for trial. The Circuit Court overruled a motion to retax a bill of costs, charging ten cents each for entering a cause on the docket of the judge, the bar, and the clerk — *held*, that only one charge of ten cents can be made for docketing each cause on the the trial docket, and that no charge can be made for entering a cause on the copies for the judge and the bar. *Kerp* v. *Fuchs*, 492.

FEES OF COUNTY TREASURER. See COUNTY TREASURERS, 1.

FISHERY.

IN WHOM THE RIGHT EXISTS.

1. By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow, that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law, or well established usage of the State, where the premises may be situate. *Beckman et al.* v. *Kreamer et al.* 447.

2. So where a party owned a tract of land on which there was a small sheet of water, having an outlet into the Kankakee river, and another entered upon the premises, against the will of the owner, for the purpose of fishing, it was *held*, the entry was unlawful, and the owner could maintain trespass therefor. Ibid. 447.

FORCIBLE ENTRY AND DETAINER.

FORCIBLE DETAINER.

1. *Of the demand, or notice to quit.* A notice to quit should be signed by the landlord or a properly authorized agent, to be binding on the tenant. To authorize a recovery in forcible detainer this must be proved. And the notice to quit must be proved by legitimate evidence. This cannot be done by producing a copy, with an affidavit of service. The witness serving it should be produced to prove the service. *Ball* v. *Peck*, 482.

2. Whether the original notice be left with the tenant, or only a true copy or a duplicate, the service must be proved by a witness. The statute has not authorized an individual to make a return of service. Ibid. 482.

3. The notice required by the third section of the act of 1865, relates to the notice terminating a lease, under the second section of that act. The seventh section of that act only dispenses with a notice of the termination

FORCIBLE ENTRY AND DETAINER. FORCIBLE DETAINER. *Continued.*
of a lease, which fixes the time when it shall expire; it requires, on the contrary, that a notice be given when he elects to terminate it for a breach of covenants. *Ball* v. *Peck*, 482.

4. This section of the act of 1865, does not conflict with or repeal the first section of the forcible entry and detainer act of 1845, which requires a demand in writing to be made for possession before forcible detainer can be maintained. It leaves the demand to be made as required by the act of 1845. Ibid. 482.

FORFEITURE.

FORFEITURE OF RECOGNIZANCE.

At what term it may be taken. See RECOGNIZANCE.

FORMER ACQUITTAL. See CRIMINAL LAW, 9.

FORMER DECISIONS.

TAYLOR V. MARCY, 25 Ill. 518, in reference to the mode of adjusting damages to the owner of land over which it is proposed to open a road, modified in *Commissioners of Highways* v. *Durham*, 86. See HIGHWAYS, 6.

MCLAGAN V. BROWN, 11 Ill. 519, as to effect of reversal of a judgment under which a judgment creditor has redeemed from a prior sale, upon his title, not acquiesced in by subsequent decisions. *Littler* v. *The People ex rel. Hargadine*, 192. See REDEMPTION, 7.

WILLIAMS V. TATNELL, 29 Ill. 565, is held not to conflict with other cases in which it is decided that a judgment creditor redeeming from a prior judicial sale is subrogated to the rights of the purchaser from whom he redeems. *Lamb* v *Richards, Admx.* 312.

WEBSTER V. VICKERS, 2 Scam. 295, and *Bradley* v. *Morris*, 3 id. 183, do not conflict with the doctrine of this court, that an indorser is not a competent witness to impeach the validity of a note which he has assigned. *Walters* v. *Witherell*, 388.

FRAUD.

EVIDENCE OF FRAUD.

1. *On a sale of goods by a debtor—purchaser must participate.* Fraud in the purchase of a stock of goods must be proved to subject them to the debts of the vendor. The mere fact that one of two partners said he intended to pay such debts as he could, and to "break full-handed," does not prove fraud in the sale of the goods, unless there is evidence that the purchaser participated in the fraud. And when he refused to become a snam purchaser, and refused to have any connection with the matter unless the sale was *bona fide*, in the absence of other evidence of fraud, it will not be presumed that he was guilty of fraud. *Waterman* v. *Donaldson*, 29.

2. *Adequacy of price — relationship of the parties.* Where it appears that a firm sold their stock of goods to a creditor, in satisfaction of his

FRAUD. EVIDENCE OF FRAUD *Continued.*
debt against the firm, and he was to pay other debts of the firm for the balance of the price of the stock, and it was invoiced to him at twenty-five per cent less than it cost, it being old and broken, it will not be inferred that there was fraud. A mere doubt of the fairness of a transaction is not sufficient, but fraud must be proved by a preponderance of evidence. Nor will the court infer that such a sale is fraudulent because it is made to an uncle of one of the partners. *Waterman* v. *Donaldson*, 29

RESCISSION OF CONTRACTS, IN EQUITY.
For fraud. See CHANCERY, 16.

OF LACHES IN RESPECT THERETO.
What will account for delay in seeking to avoid a fraudulent contract. See LIMITATIONS, 3.

ADMINISTRATOR PURCHASING AT HIS OWN SALE.
Is fraudulent per se. See ADMINISTRATION OF ESTATES, 1, 2, 3.

RELATION OF TRUST AND CONFIDENCE.
Vendor and purchaser — when the latter is bound to disclose facts to the former. See VENDOR AND PURCHASER, 1.

GARNISHMENT.

WHAT IS SUBJECT TO GARNISHMENT.

1. *Of money in the custody of the law.* As a general rule, money which is in the custody of the law is not liable to be reached by garnishee process. It has been held, that money collected on execution and in the hands of a sheriff cannot be reached on garnishee process. So of money in his hands on the redemption of lands sold on execution. It has been held by other courts, that money cannot be so reached, in the hands of selectmen due a school teacher, in the hands of a public officer, held in his official capacity; so of money in the hands of a clerk; likewise in the hands of an administrator; the same of money in the hands of a United States marshal, and in the hands of a treasurer of a board of school directors for the payment of teachers, and was held not to be a debt due from the treasurer to the teacher. *Millison* v. *Fisk*, 112.

2. The rule seems to be that a person deriving his authority from the law to receive and hold money or property cannot be garnisheed for the same, because the money or property is in the custody or control of the law, and while it so continues it does not belong to the debtor. While it so remains the law may control it, and it may never be paid to the debtor in execution. Ibid. 112.

3. *Money in the hands of a school treasurer.* Where it appeared, that a teacher's schedules had been placed in the hands of a township school treasurer, for teaching in a district, and there were funds in the hands of the treasurer subject to be apportioned to that and other districts, but had not been when the garnishee process was served, but a portion of the fund was subsequently apportioned to the district and ordered to be paid on these schedules, — *held*, that the money was not liable to be garnisheed at the time of service, nor did it become so on that service, by the subse-

GARNISHMENT. WHAT IS SUBJECT TO GARNISHMENT. *Continued.*

quent appropriation, whatever might have been the effect of a service, after the order for its payment and before its payment to the debtor in the garnishee proceeding. Nor can school directors be garnisheed for funds not in their hands or under their control. *Millison* v. *Fisk*, 112.

GRANT.

GRANT FROM THE STATE TO A RAILROAD.

1. *Of land owned by the State — what is embraced therein.* Although the language of a statute may be sufficiently comprehensive to embrace any property owned by the State, still it will not be construed to include property used by the State for a specific purpose. In such a case it cannot be inferred, that such was the intention of the legislature, and all statutes must be construed according to the intention of the body enacting them. *St. Louis, Jacksonville and Chicago Railroad Co.* v. *Trustees of Illinois Inst. for the Education of the Blind*, 303.

2. Where the general assembly in granting a railroad charter, authorized the company to enter upon, take possession of, and use all and singular any lands, streams and materials of every kind for the location of the road, depots, etc., for the construction of the road, and it contained a provision, that "all such lands, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes," — *held*, that the grant does not include the ground connected with, and used by the State for the education of the blind, although adjoining the road and convenient for its use. Ibid. 303.

3. Where the general assembly has made such a grant, and subsequently, by another act grants the company a portion of the right of way to an old and abandoned railroad belonging to the State, which is upon the line of the road of the company, it will be inferred, that such subsequent grant is a legislative construction of the prior grant, from which it appears, the general assembly did not understand that the former grant embraced property belonging to the State, not used by the State, although convenient to the construction of the road, much less to embrace property appropriated to other purposes, and in the actual use of the State. Ibid. 303.

GUARANTY.

OF INDORSEMENTS IN BLANK.

1. *Presumption arising thereon.* A stranger who indorses a note in blank at the time of its execution, is presumed to indorse as guarantor. *Dietrich* v. *Mitchell*, 40.

2. But if the name of a payee is found on the back of a note, the presumption is, in the absence of proof, that he placed it there as assignor, with a view to assume the liabilities of an assignor under our statute. If it be sought to charge him as guarantor, the plaintiff must show that he contracted as such. Ibid. 40.

CONSTRUCTION OF A CONTRACT.

3. *Whether a guaranty or a mere securityship.* See CONTRACTS, 10.

GUARDIAN AD LITEM.

OF THE APPOINTMENT.

1. *On the plaintiff's motion.* Where the minors are not brought into court, and one of them is within one year of being of age, it would not be proper to appoint a guardian *ad litem*, on the motion of the plaintiff's counsel, as he is not the person to name such guardian. *Rhoads, Exr.*, v. *Rhoads et al.* 239.

2. *By the court on its own motion.* When the record shows the appointment of a guardian *ad litem*, but no motion therefor, nor prayer therefor in the bill, such appointment will be considered the act of the court on its own motion, which it might make, *sua sponte*. Ibid. 239.

WHO MAY BE APPOINTED.

3. Under our practice it is not necessary that the person appointed as a guardian *ad litem*, should be a relative of the infants. Ibid. 239.

CANNOT BIND THE INFANTS.

4. A guardian *ad litem* cannot bind the infants by any thing he may do, or admit in his answer. Ibid. 239.

MUST DEFEND THEIR INTERESTS.

5. The rule is inflexible, that a guardian *ad litem* must defend the interests of the infants as vigorously as the nature of the case will admit. It is his special duty to submit to the court every question involving the rights of the infants affected by the suit. Ibid. 239.

MUST ANSWER BEFORE DECREE.

6. Where a guardian *ad litem* has been appointed, it is error for the court to enter a final decree against the infants without requiring an answer from such guardian. Ibid. 239.

IN GUARDIAN'S APPLICATION TO SELL LAND.

7. *Guardian ad litem not necessary.* See GUARDIAN AND WARD, 4.

GUARDIAN AND WARD.

GUARDIAN'S BOND.

1. *Presumption as to its sufficiency.* Where a guardian proceeded by bill in the Circuit Court for leave to sell lands of a minor, and an exhibit filed with the bill showed an order of the probate court appointing her guardian, and reciting that she had filed her bond,—*held*, that the court may properly presume that the bond mentioned in the order of the probate court was such as the law requires. *Campbell* v. *Harmon et al.* 18.

NOTICE OF APPLICATION TO SELL LAND.

2. *When sufficient.* In an application by a guardian in the Circuit Court to sell the real estate of his ward, a notice in due form, signed in the name of the guardian by her attorney, with affidavit of the attorney showing that he posted it in manner required by law,—*held*, sufficient; and that the attorney was a competent person to post it, and a competent witness to prove it. Ibid. 18.

PARTIES, IN SUCH APPLICATION.

3. *Whether the ward must be a party.* In proceedings by a guardian to sell real estate of his wards, the latter need not be made parties. Ibid. 18.

GUARDIAN AND WARD. *Continued.*

GUARDIAN AD LITEM.

4. Nor is it necessary, in such a proceeding, that a guardian *ad litem* should be appointed; so it matters not if one should be appointed, and his answer was improper. *Campbell* v. *Harmon*, 19.

DECREE OF SALE.

5. *Need not fix precise day or hour.* Under our statute it was not intended to require the court, in an application by a guardian to sell real estate of the minor, to fix the precise day or hour of sale. It is sufficient if the court in its order fixes certain reasonable limits, both as to the day and hour within which the sale shall be held, requiring the guardian to give due notice. The guardian may exercise some discretion in a mode favorable to the ward's interests. Ibid. 19.

AN EXECUTOR IS NOT A GUARDIAN.

6. Where a person is named in a will as executor, merely, he does not, in virtue of such appointment, become testamentary guardian of the infants. *Rhoads, Exr.*, v. *Rhoads et al.* 239.

HABEAS CORPUS.

EFFECT OF A DISCHARGE.

1. Where a party who is in prison upon a criminal charge, sues out a writ of *habeas corpus*, and is thereupon discharged, if no reason is assigned in the order of discharge, it will be presumed that the court examined into the merits of the case and became satisfied the criminal charge was not established. Under our statute a discharge upon *habeas corpus* does not preclude an investigation by the grand jury. *Walker et al.* v. *Martin*, 508.

HEIRS.

LAYING OUT A PUBLIC ROAD.

Where the land belongs to heirs — mode of assessing damages. See HIGHWAYS, 2.

HIGHWAYS.

DESCRIPTION.

1. *What a sufficient description of road ordered to be laid out.* The description of a road proposed to be laid out, is sufficiently certain, where, from the whole proceedings had thereon, taken together, there appears no difficulty in locating the same. *Todemier et al.* v. *Aspinwall et al.* 401.

ASSESSMENT OF DAMAGES.

2. *For laying out road.* Where a road was ordered to be laid out through lands belonging to an estate, an assessment of the damage to the heirs of such estate is proper and legal. Ibid. 401.

3. *Separate damages to widow — cannot be assessed.* In such case, separate damages cannot be assessed to the widow on account of an unassigned dower interest. An adjustment of the equities between the fee and the contingent right of dower must be left to the widow and the heirs. Ibid. 401.

HIGHWAYS. ASSESSMENT OF DAMAGES. *Continued.*

4. *Of the mode of adjustment under act of* 1861. The fifty-sixth section of the township organization law of 1861 imperatively requires the commissioners of highways to adjust the question of damages to the owners of land before opening a road across it. *Commissioners of Highways* v. *Durham*, 86.

5. The question of damages must be satisfactorily adjusted by release or assessment, or in some other recognized mode, before an owner can be forcibly dispossessed of his property. The act of 1861 does not require the owner to be present and claim damages, as by the old law he was required, but the commissioners, in case they and the owner cannot agree, must assess them at what they may deem just and right, and deposit a statement of the amount assessed with the town-clerk, who shall note the time of filing the same. Ibid. 86.

6. *Former decision.* The case of *Taylor* v. *Marcy* (25 Ill. 518) is modified so as to conform to the rule above laid down. Ibid. 86.

OBSTRUCTING STREETS OF A TOWN OR CITY.

Power of towns and cities to adopt ordinances to punish therefor, by fines See CORPORATIONS, 5.

ROAD TAX.

A school director not exempt. See TAXES, 9.

Road tax may be discharged in labor. See same title, 10.

HOMESTEAD.

HOMESTEAD RIGHT NOT AN ESTATE.

1. *But a mere exemption.* The homestead act has not created a new estate, but simply an exemption, and where the holder of the homestead conveys, without relinquishing the exemption, he transfers the fee, but the operation of the deed is suspended until the premises are abandoned or possession is surrendered. The act will not bear the construction that an estate is created which may be transferred and held by others than those specified in the statute. Such was not the legislative intention. *McDonald* v. *Crandall*, 232.

PURCHASER OF HOMESTEAD PREMISES.

2. *Where there is no release of the homestead right — of the character of his title.* Where the owner of land, residing upon it since the passage of the amendatory homestead law of 1857 with his wife, executes a deed of conveyance therefor, but they fail to relinquish the homestead exemption, — *held*, that such a conveyance operated to pass the fee, but suspends its operation until the grantor abandons the premises, or surrenders the possession to the grantee. Ibid. 231.

3. Where a party conveys the homestead, and the exemption is not relinquished in the mode prescribed by the statute, the grantee does not acquire such a title as would authorize a recovery in ejectment, or to defend against his grantor still remaining in possession, in an action for trespass to the premises. Ibid. 232.

HOMESTEAD. *Continued.*

OF RELEASE IN A SUBSEQUENT DEED.

4. *Its effect upon a prior grantee who is put in possession.* Where a sale by a trustee, and the trust deed under which the sale is made does not release the homestead exemption, and the grantee is let into possession, he will hold the premises against a subsequent purchaser under a sale on a deed of trust which does release the exemption. *McDonald* v. *Crandall,* 232.

JUDGMENT LIEN.

5. *Its effect on the homestead.* The homestead, when occupied by the debtor, as such, is not subject to the lien of a judgment, and its sale by the debtor and a surrender of the possession to the purchaser, who was a junior judgment creditor, is valid against a prior judgment. Ibid. 232.

EXCESS ABOVE $1,000.

6. *Is subject to a lien.* Where the homestead exceeds $1,000 in value, a judgment, mortgage, or deed of trust becomes a lien and may be enforced against the overplus; and the same is true of the excess, where there is a conveyance without a release of the exemption, as the grantee may enforce his rights to the surplus. Ibid. 232.

7. When the value of the homestead exceeds $1,000, on paying that sum to the owner, it may be sold under an execution, and in such a contingency, a judgment, whether upon the official bond of a collector, or otherwise, may be enforced, but it does not create any lien against the homestead of the debtor. *Hume et al.* v. *Gossett,* 297.

HOMESTEAD RIGHT — HOW FAR PROTECTED.

8. The homestead right is protected against all liens and sales, and against all modes of conveyance, whether by deed absolute, or by mortgage, unless released or disposed of, in the mode pointed out in the homestead act. Ibid. 297.

LIENS UPON THE HOMESTEAD.

9. *Of a town collector's bond, or a judgment thereon.* Section seven of the township organization act of 1861, making a town collector's bond a lien upon all of his real estate, does not repeal the homestead exemption act, so far as his bond is concerned. Ibid. 297.

10. A judgment rendered against a town collector upon his official bond, is like any other judgment, and creates no lien which can be enforced against his homestead, except in the mode pointed out by statute. Ibid. 297.

11. The legislature did not design to place the State, as to its revenue, in any better position than the citizen was placed in regard to the collection of his debt, as against the homestead of the debtor. Ibid. 297.

TO WHAT CHARACTER OF ESTATE THE RIGHT ATTACHES.

12. *Of parol partition between tenants in common.* The homestead law protects equally an equitable as well as a legal title to lands, and when a parol partition between tenants in common was had, followed by a several possession, and before judgment lien attached, each can claim

HOMESTEAD.

TO WHAT CHARACTER OF ESTATE THE RIGHT ATTACHES. *Continued.*

the homestead right, even though the legal title to one-half of his allotment be in the other, as each held it since partition as trustee for the other. *Tomlin* v. *Hilyard*, 300.

OF THE LEGAL SUBDIVISIONS OF LAND.

13. *Territorial extent of homestead right.* Under our statute, the lot of ground and buildings owned and occupied by the debtor and his family, to the value of $1,000 is exempt from levy and forced sale. The court will take judicial notice, that a quarter section of land is made up of four forties, each with well defined bounds. This being so, it is competent to inquire the value of the forty so occupied, and if it does not exceed $1,000, the same is exempt, unless released in the mode prescribed by the statute. To refuse such inquiry is error. *Hill* v. *Bacon*, 477.

OCCUPANCY — ABANDONMENT.

14. *Occupancy by the widow.* This court has held, that, under the second clause of the first section of the homestead law, a widow entitled to claim its benefits, and in infirm or delicate health, does not lose the benefit of the act by leaving the homestead to remain temporarily with her friends, for the benefit of her health, leaving the premises occupied by a tenant during her absence. *Titman* v. *Moore*, 169.

15. *Occupancy after the husband has abandoned the family.* And it has also been held, that under the amendatory act of 1857, where the husband abandoned his wife and family, she might remain and hold the homestead as against his acts or those of his creditors. Ibid. 169.

16. *Of temporary absence of husband.* Also, that a husband, by being temporarily absent, while in pursuit of a new home, did not thereby forfeit the right to claim his homestead. Ibid. 169.

17. But while the court adhere to the former decisions, that a debtor may leave his home for temporary purposes without losing the benefit of the homestead act, they also hold, that the intention to return and occupy it as a homestead must be clearly manifested by surrounding circumstances. Ibid. 170.

18. *New residence — when a waiver of the homestead.* But a person having acquired a new residence, although not a homestead, cannot be permitted to insist upon the homestead right, to defeat a deed or mortgage executed by him while occupying such newly acquired residence, and which fails to release the benefit of the act, unless it clearly appears that the new residence was only temporary. Ibid. 170.

19. So, where a person left his farm, and removed to a town six miles distant, where he voted at two local elections, first renting his farm for three years, at the end of one year terminating that agreement, and renting it anew for five years, and, after having been eighteen months absent from his farm, executed a mortgage which did not release the benefit of the homestead act, — *held*, that the mortgagee took his lien free from the operation of the homestead act, and that the right to a homestead was

HOMESTEAD. OCCUPANCY — ABANDONMENT. *Continued.*
not restored by a subsequent return to, and residence on, the farm. *Titman* v. *Moore*, 170.

20. *Abandonment — effect as to subsequent liens.* The husband, being the head of the family, has the right to determine and control their residence; and when he intentionally removes from and abandons the homestead, and his family accompanies him, neither he nor they have any power to resume it, so as to cut off intervening liens which have attached during such abandonment. Ibid. 170.

21. The right to claim the benefit of the homestead act, is controlled by the situation of the property at the time the debt was contracted, or the lien attached, and not by the subsequent acts of the debtor and his family. If the premises are not exempt at the time of creating the debt or lien, a subsequent possession of the homestead would not exempt it. On the other hand, the homestead may have been exempt at the time the debt was contracted, and become liable by its subsequent abandonment. Ibid. 170.

22. *Occupancy by the husband, different from that of the family.* The homestead law seems to imply by its terms, that, where its benefits are claimed by the husband, it must appear, that he occupied it as a residence, lived upon it, and made it his home, and that of his family; and thus an occupancy of a husband by a tenant is not sufficient. But a simple occupancy by the widow or the children is sufficient, and their occupancy may be by a tenant. Ibid. 170.

HUSBAND AND WIFE.
CANNOT CONTRACT WITH EACH OTHER.
Effect of act of 1861 *in that regard.* See MARRIED WOMEN, 6

IMPLIED COVENANTS.
IN A LEASE. See LANDLORD AND TENANT, 3.

IMPRISONMENT FOR DEBT. See INSOLVENT DEBTORS, 1, 2, 3.

IMPRISONMENT OF TORT FEASORS. See INSOLVENT DEBTORS, 1, 2, 3.

INFANTS.
DEFAULT CANNOT BE ENTERED.
Full proof required. A bill cannot be taken as confessed against infants, under any circumstances, nor their interests decreed away without an answer by their guardian *ad litem*, or on full proof. A default cannot be entered against them, nor can any thing be admitted, but every thing must be proved against infants, and the record must furnish proof to sustain a decree against them, whether the guardian *ad litem* has answered or not. *Rhoads, Exr.*, v. *Rhoads et al.* 240.

GUARDIAN AD LITEM. See that title, *ante*.

INJUNCTIONS.

JURISDICTION, AS TO AMOUNT.

1. Under our statute, courts will not entertain jurisdiction or grant an injunction to restrain the collection of a judgment, where the amount in controversy is less than twenty dollars. *Breckenridge* v. *McCormick et al.* 491.

WHEN THEY WILL LIE, AND WHEN NOT.

2. *Of restraining a municipal corporation.* Even if an injunction can be decreed to restrain a corporation from the abuse of its franchises, by the adoption of ordinances and acts, which will produce injury to individuals, it must appear that the acts complained of are unauthorized, injurious and of such a character that proceedings at law will not afford adequate and full relief. *Gartside* v. *City of East St. Louis et al.* 47.

3. *In regard to invasion of riparian rights.* To authorize the interposition of a court of chancery by injunction to restrain a riparian proprietor from using the water of a stream for manufacturing purposes, the complainant must first establish his rights, and a violation of those rights, in a court at law. *Bliss et al.* v. *Kennedy et al.* 68.

4. If a riparian proprietor willfully, or wantonly, or carelessly, so use his privilege as to injure the rights of others, the courts of law are open to them, in which to establish their rights and redress the wrong. Chancery cannot interpose until the right and its invasion are determined. Ibid. 68.

5. *When chancery will prevent an injury.* Chancery may, for the purpose of preserving property until a legal decision upon the right set up can be had, restrain by injunction a party doing or threatening an invasion of the rights claimed, but in all such cases the party complaining must show a strong *prima facie* case in support of the title which he asserts, and show that he has not been guilty of any improper delay in applying for the interposition of the court. In such case the court will also take into consideration the degree of inconvenience and expense to which the granting of the injunction would subject the defendant in the event of his being found to be in the right. Ibid. 68.

6. *Opening a road without an adjustment of damages.* An attempt to open a road in the absence of an adjustment of the question of damages with the owner of improved and cultivated lands, upon which the road is located, will be restrained by a court of chancery. *Commissioners of Highways* v. *Durham*, 86.

7. *Intrusion of a clergyman into a church—injunction will lie.* See CHURCHES AND CHURCH PROPERTY, 3, 4.

RESTRAINING COLLECTION OF TAXES.

8. *Upon an improper change of assessment.* Where an assessor, after having accepted a list of taxable property, arbitrarily increases it, without giving notice to the tax payer, and the latter has no knowledge of the increase until after the time allowed for an appeal has expired, a court of equity will restrain the collection of the tax based upon the assessment. *Cleghorn* v. *Postlewaite*, 428.

INJUNCTIONS. Restraining collection of taxes. *Continued.*

9. *Should only affect illegal portion.* Where a bill is filed to stay the collection of a tax levied to pay county orders issued for bounties, a portion of which are authorized, and a portion unauthorized by law, the court should ascertain the amount the unauthorized bear to those authorized, and reduce the levy by the proportion the former bears to the latter, and require the remainder to be collected and applied to the payment of those legally issued. *Briscoe et al.* v. *Allison et al.* 291.

Damages on dissolution.

10. *Attorney's fee.* On the dissolution of an injunction, where a suggestion of damages shall be filed, the statute requires the court to assess the damages, — *held*, that it is not error to allow a counsel fee in such assessment. *Misner et al.* v. *Bullard*, 471.

INSOLVENT DEBTORS.

Discharge from imprisonment.

1. *Act of* 1845 *not applicable to actions for torts.* The act of 1845, relating to insolvent debtors, was only applicable to that class of debtors, becoming so by contracts into which they may have entered, and not to arrests on *mesne*, or final process for torts. *The People ex rel. Livergood* v. *Greer*, 213.

Tort feasors, under act of 1845.

2. *How imprisoned.* Under the amendatory act of 1845, tort-feasors could be imprisoned, if the plaintiff in the action was willing to, and did advance, weekly, the jail charges. Ibid. 214.

Tort feasors — under act of 1861.

3. *Rights of insolvent debtors — how far extended to tort feasors.* By the act of 1861, the right to be dealt with as an insolvent debtor, was extended to all tort feasors, except those whose torts originated in malice, or where malice was the *gist* of the action. Ibid. 213.

INSTRUCTIONS.

Of thier requisites.

1. *Must be based upon evidence.* It is proper for the court to refuse an instruction which has no basis in the evidence. *Leake* v. *Brown*, 373.

2. It is not error to refuse instructions which are not based on the evidence, though they may present correct abstract legal propositions. *Brownfield et al.* v. *Brownfield et al.*, 148.

3. *Need not be repeated.* It is not error to refuse instructions where the principles which they announce are embodied in those that are given. Ibid. 148.

4. *As to testimony.* The court may instruct the jury what is evidence, but not what it proves. *Thompson et al.* v. *Hovey*, 198.

5. *Upon matter inadmissible in evidence.* It is error for the court to instruct the jury upon matters inadmissible in evidence under the pleadings, but which, in fact, were admitted in proof. *Illinois Central Railroad Co.* v. *McKee*, 120.

INSTRUCTIONS. *Continued.*

QUESTIONS OF LAW AND FACT.

6. *In which character a given question is to be considered.* See PRACTICE, 1, 2.

INSURANCE.

INSURANCE BY A MORTGAGOR.

1. *Of the right.* It is well settled, that a mortgagor may insure to the full value of the property, and recover the sum insured, if, at the time of the loss he had the right of redemption; and this, even though the premises have been taken by the mortgagee. *Stephens* v. *Illinois Mutual Fire Ins. Co.* 327.

2. *Rights of purchaser from mortgagor — on foreclosure, under agreement to extend time of redemption.* A owned certain premises and mortgaged them to B; afterward, he procured insurance upon them, and then sold to C, at the same time assigning to him the policy of insurance, by consent of the company. B commenced suit for the foreclosure of his mortgage, making A and C parties, but the litigation was subsequently compromised, by an agreement in writing, that B should take a decree for an amount equal to the face of the claim, and, in consideration therefor, A and C should have *two years* from the day of sale to make redemption. A decree was entered, providing for redemption within *fifteen months;* and sale was accordingly had, and the premises bid in by an agent of B, the mortgagee, and afterward, in about fourteen months and eight days after the sale, were destroyed by fire. In an action by C against the insurance company, to recover the amount of the insurance, *held,* that, had a third person, for a valuable consideration, and without notice, acquired title under the decree, within the two years, his rights would be governed by it, without reference to the agreement. Ibid. 327.

3. The premises having been purchased by the plaintiffs in the foreclosure suit, as against them, the agreement is operative. Ibid. 327.

4. The proof shows, that the decree and agreement were made together, one being the consideration for the other, and there is no inconsistency in permitting both to stand, it being the undoubted intention to give the defendants two years' redemption. Ibid. 327.

5. Under this agreement, the subsisting relation of mortgagor and mortgagee was substantially continued, and a tender by defendants of the redemption money at any time within the two years, would have been good. Ibid. 327.

6. At the time of the fire, C's position was that of a mortgagor, with a right to redeem; and, as such, he had a substantial, insurable interest. which estate could not have been lost until the expiration of the time for redemption. Ibid. 327.

7. It was not necessary, that the insurance company should have been a party to the agreement, and the proceedings in the suit of foreclosure and sale determine clearly that C did not thereby lose his right of redemption. Ibid. 327.

JOINT AND SEVERAL RIGHTS.

RIGHT OF ACTION.

Whether joint or several. See PARTIES, 9.

LIABILITY IN TRESPASS.

Whether joint or several. See PARTIES, 8.

JUDGMENTS.

SETTING JUDGMENT ASIDE.

1. *After the term.* After a term of the Circuit Court has expired no discretion or authority remains with that court to set aside a judgment. *McKinley et al.* v. *Buck et al.* 488.

AMENDING JUDGMENTS.

2. The court may amend it in a mere matter of form, upon due notice to the opposite party. Ibid. 488.

REVIVOR OF JUDGMENT.

3. *On the death of the defendant.* See EXECUTIONS, 1.

JUDGMENT CREDITOR.

REDEMPTION FROM JUDICIAL SALES.

Of the manner in which the redemption must be made. See REDEMPTION, 3 to 6.

Subrogation to rights of former purchaser. See REDEMPTION, 1, 2.

JUDGMENT DEBTOR.

REDEMPTION FROM JUDICIAL SALES.

To whom he may make payment. See REDEMPTION, 8.

DEATH OF JUDGMENT DEBTOR.

How to obtain execution. See EXECUTIONS, 1.

JUDGMENT LIEN

ITS EFFECT UPON A HOMESTEAD. See HOMESTEAD, 5 to 8.

JUDICIAL NOTICE.

OF A DIVORCE.

1. A court cannot take judicial notice of the fact, that suitors in certain proceedings before it, have been divorced, not even if the decree of divorce was pronounced by the same court. *Streeter* v. *Streeter*, 157.

WHETHER A TERM OF COURT WAS HELD.

Whether the court can know judicially, on demurrer to sci. fa. on recognizance. See RECOGNIZANCE, 2.

OF LEGISLATIVE JOURNALS.

In what manner brought to the attention of the court to ascertain whether a law was properly passed. See STATUTES, 2, 3, 4.

LEGAL SUBDIVISIONS OF LAND.

That a quarter section of land consists of four forties, each with well defined boundaries. See HOMESTEAD, 13.

JURISDICTION.

PROBATE COURT.

1. *Of its equitable jurisdiction over claims presented.* The Probate Court has equitable jurisdiction in the allowance of claims against the estates of deceased persons. *Hurd, Admr.*, v. *Slaten*, 348.

DENIAL OF JURISDICTION — ESTOPPEL.

2. In an action upon a replevin bond, it was objected by the obligor, upon general demurrer, that the declaration did not aver that the justice of the peace before whom the action of replevin was tried had jurisdiction of the cause, — *held*, that, having sought that jurisdiction, he was estopped by his own act and admission. *Bates et al.* v. *Williams*, 494.

DEFENSE — WHETHER AT LAW OR IN EQUITY.

Want of authority of attorney to prosecute a suit — defense is in the suit at law, not in equity. See CHANCERY, 4.

INJUNCTIONS — AMOUNT.

Amount in controversy must not be less than twenty dollars. See INJUNCTIONS, 1.

CHANGE OF VENUE.

Jurisdiction acquired thereby. See VENUE, 1, 2.

JURY.

WEIGHT OF EVIDENCE.

Jury must judge. It is error for the court to direct the jury as to the weight of the evidence; it is the province of the jury to determine that question. The court may instruct as to what is testimony, but not what it proves. *Thompson et al.* v. *Hovey*, 198.

MEANING OF WORDS IN A CONTRACT.

To be given by the court, not left to a jury. See CONTRACTS, 4, 5, 6.

QUESTIONS OF LAW AND FACT. See PRACTICE, 1, 2.

LACHES.

DELAY IN ALLEGING FRAUD.

What will explain it. See LIMITATIONS, 3.

LANDLORD AND TENANT.

SURRENDER OF A LEASE.

1. *Construction of an agreement therefor.* Where A, in the possession of certain land under a lease, upon which was situated a house, and cistern containing wholesome water, and an orchard, made an agreement with B to surrender to her the remainder of his demised term to said premises, and "to deliver up full and complete possession of said land" to B immediately upon the execution thereof, — *held*, that the words "to deliver up full and complete possession of the land," fairly imply a delivery of the land, house, cistern and orchard, in as good condition as they were at the time of the execution of the agreement, natural deterioration, decay and inevitable accident, excepted. *Strecter* v. *Strecter*, 156.

LANDLORD AND TENANT. SURRENDER OF A LEASE. *Continued.*

2. Where two contracts were made between two parties, one, that certain premises should be immediately surrendered to the other, and the other contract, that the party surrendering the premises should take his effects away from the same whenever the other was ready to remove thereon, — *held*, that the two contracts were consistent with each other. In one, possession was to be given immediately; and in the other, the removal of the effects was to be as soon as practicable, the law allowing to him a reasonable time. *Streeter* v. *Streeter*, 157.

IMPLIED COVENANTS IN A LEASE.

3. In an ordinary lease, the law will imply covenants against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises. Ibid. 156.

OF A NEW LEASE.

4. *What constitutes.* Where a landlord says to the wife of his tenant holding over, that he did not wish him to leave the premises, and that he would not disturb the tenant until a lessee of the property, after the expiration of the former lease, should disturb the landlord, — *held*, that this does not constitute a new lease to the tenant holding over. *Ball* v. *Peck*, 482.

NOTICE TO QUIT.

To authorize a recovery in forcible detainer. See FORCIBLE ENTRY AND DETAINER, 1 to 4.

LARCENY.

WHAT CONSTITUTES LARCENY. See CRIMINAL LAW, 1 to 4.

WHERE PUNISHABLE. Same title, 5.

LEASE. See LANDLORD AND TENANT, 1 to 4.

LEGISLATIVE JOURNALS.

JUDICIAL NOTICE THEREOF. See STATUTES, 1 to 4.

LEVY.

LEVY OF AN ATTACHMENT.

When the officer may pursue the defendant out of his county. See ATTACHMENT, 1, 2.

REMEDY TO AVOID A LEVY.

When the officer improperly goes out of his county. See MOTION, 2.

LICENSE.

POWERS OF MUNICIPAL CORPORATIONS.

1. *What may be the subject of license — transportation of coal in wagons.* Where a city charter authorizes the common council to direct, license and control all wagons and other vehicles carrying loads within the city, an ordinance adopted under the charter, requiring persons transporting coal in such vehicles from places within to places outside the city, to obtain a license before such transportation can be made, is not unreason-

LICENSE. POWERS OF MUNICIPAL CORPORATIONS. *Continued.*

able and will be sustained if the sum required to be paid therefor is reasonable. *Gartside* v. *City of East St. Louis et al.* 47.

2. *Whether in restraint of trade.* Such an ordinance is not in restraint of trade any more than requiring pedlars, brokers, factors, ferrymen, hackmen and others, to procure a license to exercise their various callings and pursuits. They are all required to submit to reasonable exactions. The city being required to keep its streets in repair, it is but reasonable, that those who constantly use them with such vehicles should contribute to their repair, by submitting to the payment of a reasonable sum for a license. Ibid. 47.

LICENSE OF "BANKERS" BY CITIES.

What constitutes a "banker." See BANKS AND BANKERS, 1, 2.

LIEN.

LIEN UNDER A RECOGNIZANCE.

1. *When it attaches.* A recognizance is not a lien on real estate, until there is a judgment of forfeiture and an award of execution on a *scire facias*, or until a judgment in debt is recovered on the recognizance. *McKee* v. *Brown*, 130.

2. So a sale by the principal recognizor, before the lien of the judgment on a recognizance attaches, passes the title, and a sale under an execution upon such a judgment does not divest such title, nor does the purchaser under such a sale acquire any title as against the prior vendee who has recorded his deed before the lien of the judgment attached. Ibid. 130.

LIEN UPON A HOMESTEAD.

By a judgment or mortgage. See HOMESTEAD, 5 to 8.

By a town collector's bond, or a judgment thereon. See same title, 9, 10, 11.

LIEN OF CONSIGNEE.

When it attaches See CONSIGNOR — CONSIGNEE, 2.

LIMITATIONS.

LIMITATION AS TO TRUSTS.

1. *How far applicable.* While statutes of limitation do not strictly apply to trusts, yet, in cases of constructive, as distinct from express trusts, courts of equity will sometimes adopt the analogies of the statute, and refuse relief after an unreasonable and unexplained lapse of time. But the courts have never sought to lay down a precise rule. Each case is to be adjudged in this regard upon its particular circumstances. *Miles et al.* v. *Wheeler et al.* 124.

2. *Of acquiescence — from what time to be computed.* Where, in case of a trustee purchasing at his own sale, the party claiming title through such sale relies upon the acquiescence of the *cestui que trust*, to relieve the sale of its fraudulent character, such acquiescence is only to be computed from the period when the injured party acquired, or ought, in the ordinary course of affairs, to have acquired, a knowledge of the fraud. Ibid. 124.

LIMITATIONS. *Continued.*

OF LACHES, ASIDE FROM THE STATUTE.

3. *Delay in alleging fraud.* Where a party files a bill to avoid a contract for the sale of land within ten months from the time the fraud was discovered, and that delay is explained by the fact that he was advised by counsel to postpone the commencement of a suit until the decision of another then pending, it is not such *laches* as would bar his relief. *Cox* v. *Montgomery*, 110.

LIMITATION LAW OF 1839.

4. *Tax receipts are not conclusive upon the question — on whose account and for whom payment was made.* Upon the question, on whose account and for whom payment of taxes has been made, the tax receipts therefor are not conclusive evidence. Like other receipts, they are susceptible of explanation. *Rand* v. *Scofield*, 167.

5. *Payment of taxes may be made by an agent.* A principal can claim in support of his title the benefit of taxes paid by his agent, without reference to the state of accounts between them. Ibid. 167.

6. *What constitutes claim and color of title.* Claim and color of title exists where the deed, upon its face, purports to convey the fee, and the grantee goes into possession under it, and accepts and holds it in his own right, and as an owner of the fee. *Cook* v. *Norton et al.* 391.

7. *Effect of notice of adverse claims.* Under the act of 1839, the recording laws will not be regarded. Limitation laws do not proceed upon the theory of the absence of notice of an adverse claim to the premises, and hence the limitation will run in favor of a party having claim and color of title, although he may have actual notice of an adverse claim by record, or otherwise. Ibid. 391.

8. *Payment of taxes must be for seven years.* Where a party desires to avail himself of the seven years limitation act, he must show payment of all taxes legally assessed upon the premises, for the period of seven successive years, with claim and color of title. Ibid. 391.

9. *Of tax receipts — their requisites.* See TAXES AND TAX TITLES, 14, 15, 16.

LIMITATION ACT OF 1835.

10. *What necessary to bar the right of entry.* Section eleven of the limitation act of 1835, requires that possession shall be held by actual residence on the premises, having a connected title in law or equity, deducible of record from the United States, or this State, or the officers therein enumerated. Ibid. 392.

11. And this section cannot be invoked in aid of a party, who, although he may have a connected title in law, deducible of record from this State, is unable to show actual residence on the premises for the period of seven successive years, by his ancestor or himself. Ibid. 392.

LIVE STOCK.

RUNNING AT LARGE.

1. *Under the general law* of this State, as construed in *Seeley* v. *Peters* 5 Gilm. 130, cattle have a right to go at large, and the owner of a field upon

LIVE STOCK. RUNNING AT LARGE. *Continued.*

which they may go has no right to recover for damages unless his field was inclosed by a good and sufficient fence. But this law, as thus construed, did not impose the duty of fencing as a positive obligation. It simply withheld the common law right to recover damages in cases where there was not a sufficient fence, and this on the ground that the cattle were rightfully at large. *Westgate* v. *Carr*, 450.

2. *Powers of towns, under the township organization law.* The general law upon the subject of stock running at large has been so modified by the township organization act, that it is no longer of universal application. Each township, in counties which adopt the township organization law, is expressly authorized to regulate this subject for itself; and when a town has, under this legislative authority, established rules upon this matter inconsistent with the general law as construed in *Seeley* v. *Peters*, that law, in such towns, ceases to be applicable. Ibid. 450.

3. So under the township organization, the electors of each township, at their regular town meeting, have the power to restrain or prohibit cattle, etc., from running at large; to authorize the distraining, impounding and sale of the same for penalties, and to determine the time and manner in which such animals may go at large. Power is also given to make rules ascertaining the sufficiency of fences, and to determine what shall be a lawful fence within such town. Power is further given to impose such penalties for a violation of any by-laws of the town, except those relating to the keeping and maintaining of fences, as the town may think proper. Ibid. 450.

TRESPASS BY CATTLE RUNNING AT LARGE.

4. *When an action will lie therefor.* Where townships have adopted rules prohibiting stock from running at large, and there are no regulations requiring fences, the owners of cattle will be liable for injuries occasioned by their stock going upon unfenced fields. Ibid. 450.

MAJORITY.

WHEN A MAJORITY MAY ACT.

Board of revisors of tax assessments. See TAXES AND TAX TITLES, 18.

MALICIOUS PROSECUTION.

WHEN THE ACTION MAY BE COMMENCED.

1. To maintain this action the plaintiff must show that the criminal prosecution was legally ended before the action was commenced. If the criminal prosecution be not ended at the time the action is commenced then the action is premature. *Walker et al.* v. *Martin*, 508.

2. On the trial of an action for malicious prosecution, the plaintiff who had been bound over to appear before the Recorder's Court of the city of Chicago, showed a discharge upon *habeas corpus*, by the Circuit Court of Cook county, to prove that the criminal prosecution had been ended; *held*, that it should also have been made to appear on the trial that the

MALICIOUS PROSECUTION.

WHEN THE ACTION MAY BE COMMENCED. *Continued.*

State's attorney did not send the case with the recognized witnesses to the grand jury, or if he did send them that no steps had been taken by the people. *Walker et al.* v. *Martin*, 508.

MANDAMUS.

AGAINST WHOM IT WILL ISSUE.

For the payment of money out of the State treasury. In a proceeding by mandamus against the State treasurer and the auditor, to compel the payment of interest due upon certain State bonds, the right thereto being established, and the auditor being a party to the application, through whom alone the treasurer can pay out money, a peremptory *mandamus* will issue to the auditor, requiring him to issue his warrant upon the treasurer for the amount of interest due. *The People ex rel. Clemens* v. *The Treasurer and Auditor*, 220.

MARRIED WOMEN.

THEIR RIGHTS UNDER ACT OF 1861.

1. *What classes of property are protected.* There are three classes of property mentioned in the act of 1861, in relation to the rights of married women, to be affected by its provisions, viz.: First, the property belonging to any married woman as her sole and separate property at the time when the law was passed or took effect; second, the property of women thereafter to be married; and, third, the property thereafter to be acquired by married women. This act was designed to clothe married women for the future, that is, from and after the time it took effect, with the exclusive title to, and dominion over their own property; and as one incident thereto, to protect it from execution or attachment for the debts of her husband. *Farrell* v. *Patterson*, 52.

2. *Of the common law rule in regard to personalty.* Where a woman was married, and received large sums of money, prior to the passage of the act of 1861, the money, by force of well known and long established principles of law governing marital relations, became the property of her husband; and any chattels purchased with it became his likewise. Ibid. 53.

3. *The act is prospective, only.* The statute of 1861, never was designed to take from the husband that which belonged to him as a consequence of the marriage. The act is prospective only, and was not designed to change, and could not change the title to property possessed by the wife prior to its passage, and which by her marriage vested in her husband. Ibid. 53.

4. *Burden of proof where wife claims property.* The presumption of law is that the husband is the owner of all the property of which the wife may be in possession, especially if they are living together as husband and wife. To overcome this presumption, she must show affirmatively, the property is her own, and derived from a source other than her husband, and in good faith. Ibid. 53.

MARRIED WOMEN. THEIR RIGHTS UNDER ACT OF 1861. *Continued.*

5. *Of the earnings of married women.* The earnings of a married woman are not vested in her by the act of 1861. They belong to her husband, as well as the property purchased by them.* *Furrell* v. *Patterson*, 53.

CONTRACTS BETWEEN HUSBAND AND WIFE.

6. *Effect of act of* 1861 *in that regard.* The act of 1861, relative to married women, does not in any wise remove the disability of the wife in respect to contracts made with her husband. *Streeter* v. *Streeter*, 157.

MASTER IN CHANCERY.

OF HIS REPORT.

Need not contain the evidence. On a reference to the master, to take proof "and report the facts," it is not necessary that he should report the evidence. It will be sufficient to report the facts proven by the evidence produced before him. The better practice is to report the evidence. *Campbell* v. *Harmon et al.* 19.

MEASURE OF DAMAGES.

EXPULSION OF PASSENGERS UPON RAILROADS.

1. *Measure of damages.* Where a passenger is expelled from a train, and without fault on his part, he may recover more than nominal damages, even though he has suffered no pecuniary loss, or received actual injury to the person by reason of such expulsion. *Chicago and Alton Railroad Co.* v. *Flagg*, 364.

2. In such case, although the proof shows that the conductor acted in good faith, and without violence or insult, and that no actual damage was sustained, still the jury, in estimating the damages, may consider not only the annoyance, vexation, delay and risk to which the person was subjected, but also the indignity done to him by the mere fact of expulsion. Ibid. 365.

KILLING STOCK BY A RAILROAD.

3. In an action on the case against a railroad company for stock killed by its trains, where such injury was purely accidental, and resulted simply by reason of the failure of the company to fence its road, the measure of damages is the value of the property destroyed. *Toledo, Peoria and Warsaw Railroad Co.* v. *Arnold*, 418.

4. In such case, where aggression and malice are not present, the claim to compensation rests solely upon the value of the property destroyed, and a recovery cannot be had beyond that amount. Ibid. 418.

* Since the decision of the above case, the following act has been passed by the legislature:

AN ACT in relation to the Earnings of Married Women.

Approved March 24, 1869.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. That a married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors; *Provided*, this act shall not be construed to give to the wife any right to compensation for any labor performed for her minor children or husband. Sess. Acts, 1869, (Chicago Legal News ed.), p. 1.

MEASURE OF DAMAGES. *Continued.*

IN AN ACTION FOR THE DEATH OF ANOTHER.

5. Under the statute which authorizes an action to be brought for the use of the widow or next of kin, where a person has met with death caused by the wrongful act, neglect or default of another, whenever there are next of kin, an action will lie for the recovery of at least nominal damages. *Chicago and Alton Railroad Company* v. *Shannon, Admr.* 339.

6. But the recovery can be only for the pecuniary loss and damage, and not for the bereavement. Nothing can be given as *solatium*. Ibid. 339.

7. If, then, the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. Ibid. 339.

8. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss for which compensation under the statute must be given. Ibid. 339.

9. So, also, if the deceased was a minor and leaves a father, entitled by law, to his services. Ibid. 339.

10. The question of how damages are to be measured, may be largely left (within the limit of the statute) to the discretion of the jury, to whom the law commits the question, and who can give such damages as they shall deem a fair and just compensation. What the life of a person is worth, in a pecuniary sense, to another, is a question which does not lie within the limits of exact proof, and hence the subject has been confided to the jury, — the court to see that their finding be not the result of passion or prejudice. Ibid. 339.

11. *What not considered excessive.* In an action to recover damages for the death of a person, caused by the explosion of a locomotive engine, where the proof showed, that the deceased left a father fifty years old, who had little property beside his homestead; that when not on the road he had lived with him, and contributed to the support of the family; and that upon the father's life there was a policy of insurance for the benefit of the mother of deceased, upon which deceased had paid the premiums, and had promised to keep the same paid, a verdict in such case for $2,000 is not excessive damages. Ibid. 339. Mr. Justice BREESE *dissenting.*

MENTAL CAPACITY.

TO MAKE CONTRACTS. See CONTRACTS, 2.

MERGER.

OF THE LESS IN THE GREATER ESTATE.

Where a greater and less estate meet in the same person, a merger does not necessarily follow. That will depend upon the intent and the

MERGER. OF THE LESS IN THE GREATER ESTATE. *Continued.*
interest of the parties; and if a court perceives it is necessary to the ends of justice that the two estates will be kept alive, it will so treat them *Edgerton et al.* v. *Young et al.* 464.

CONVEYANCE IN FEE BY MORTGAGOR TO MORTGAGEE.
Whether a merger results. See MORTGAGES, 4 to 7.

MISJOINDER.
MISJOINDER OF PARTIES PLAINTIFF.
In actions ex contractu — how taken advantage of. See PARTIES, 7.

MISTAKES.
CORRECTED IN EQUITY.
Misdescription of land in a deed. Where, in preparing a deed for execution, the scrivener misdescribes the property, when made satisfactorily to appear, a court of equity will correct the mistake and reform the deed. *Clearwater et al.* v. *Kimler et al.* 273.

MONEY-CHANGER. See BANKS AND BANKERS, 1, 2, 3.

MORTGAGES.
WHAT CONSTITUTES A MORTGAGE.
1. *Of a deed absolute in form.* It is the settled doctrine in equity, that the form of a transaction will not be regarded, but the intention of the parties must control. If the transaction was in fact a loan or security for money owing, although the conveyance be absolute on its face, still it will be treated as a mortgage, but that fact must be satisfactorily shown. *Taintor* v. *Keys et al.* 332.

2. *When a purchase and sale, and not a mortgage.* Where a person, holding a certificate of purchase, assigns it to a third person, and he agrees, if the debtor will pay him a specific sum by a day named, that he will convey him the property, and give him a bond for the purpose, this is in form a purchase from one person and a sale to another. It is unlike a loan of money or pre-existing debt, and the debtor conveys real estate by a deed absolute on its face, and the creditor gives a bond for a reconveyance on the payment of the money. In such a case, the transaction would appear to be a conveyance with a defeasance. Ibid. 333.

CONSTRUCTION OF A CONDITION.
3. *What will be regarded as performance thereof.* A. C. D. and G. M. M. partners under name of A. C. D. & Co., being indebted to C. R. H. for lumber, gave their four notes for the same, dated January 15, 1860, — one for $4,000, due in thirty-three days; one for $3,870, due in six months; the third for $3,870, due November 15, 1860; and the fourth for $4,070, due February 15, 1861; M. M. signed each of said notes as security. A. C. D. and wife, for the purpose of securing M. M., executed to him a mortgage, which recites all the notes, the dates, and sums for which given, and the day each note becomes due; and after this recital contains this condition: "The said A. C. D. is bound to pay one-half of

MORTGAGES. CONSTRUCTION OF A CONDITION. *Continued.*

all and each of said several notes, and the said G. M. M. is bound to pay the other half thereof. Now if the said A. C. D. shall well and truly pay his said one-half of each of said notes when due, then this deed shall from thence forward be null and void; it being hereby fully understood that this deed of mortgage is to secure said M. M. against the payment of A. C. D.'s half of said notes only." *Held*, that the payment of one-half of the whole sum due upon all the notes by A. C. D. was a performance of the condition, and discharged the mortgage. *McConnel* v. *Dickson et al.* 99.

CONVEYANCE IN FEE BY MORTGAGOR TO MORTGAGEE.

4. *Whether a merger results.* A mortgagee may procure a conveyance of the mortgaged premises from the mortgagor without necessarily merging the lien of his mortgage in the greater estate. *Edgerton et al.* v. *Young et al.* 464.

5. A mortgagee assigned a note secured by mortgage, and subsequently procured a conveyance in fee of the mortgaged premises from the mortgagor to himself. The land was then levied upon and sold as the property of the mortgagee, to a third party. *Held*, that the only interest acquired by the purchaser at the sale was the equity of redemption. Ibid. 464.

6. If a purchaser finds upon record a mortgage, and a subsequent deed from the mortgagee to the mortgagor, it is probable that he would be protected under our registry laws against the claim of an assignee of the note secured by the mortgage, in the absence of notice of such assignment. Ibid. 464.

7. Although the assignment of a note, secured by mortgage, carries with it the equitable interest in the mortgage, it carries only the equitable interest, and if the assignee desires to protect himself against all peril from a release of the legal title by the mortgagee to the mortgagor, and a subsequent conveyance by the mortgagor to a third person without notice, it would probably be held, that the assignee of the note should also take and record a deed from the mortgagee for the mortgaged premises. But where the mortgagor conveys to the mortgagee the same rule does not apply. Ibid. 464.

PURCHASER OF EQUITY OF REDEMPTION.

8. *Not liable to pay the mortgage debt.* Where the purchaser of the equity of redemption of mortgaged property is made a defendant to a bill to foreclose, it seems to be error to render a decree, that he pay the mortgage debt. The decree should be against the mortgagor, but by the sale of the mortgaged premises in satisfaction of the debt, the error is removed, and as the purchaser of the equity of redemption thus ceases to be liable, he cannot impeach the decree on a bill of review. *Dunn* v. *Rodgers et al.* 260.

9. *Time for redemption allowed to such purchaser.* See REDEMPTION, 9.

OF A STRICT FORECLOSURE.

10. *Whether a discharge of the entire debt.* The equitable rule, and the one sustained by the weight of authority, is, that a strict foreclosure of a

MORTGAGES. OF A STRICT FORECLOSURE. *Continued.*
mortgage is only a discharge of the debt *pro tanto*. *Edgerton et al.* v. *Young et al.* 470.

RELEASE OF A MORTGAGE.

11. *What constitutes.* After the payee of a note secured by mortgage, had assigned the note to a third party, he obtained a conveyance to himself in fee, of the mortgaged premises, and subsequently they were levied upon and sold under a judgment against the mortgagee. The assignee of the note, supposing his lien under the mortgage was gone, took a deed for other lands, from a brother of his assignor, and gave to the latter a contract to reconvey these lands upon payment of the note within a specified time, which not being done, the title became absolute in the assignee. *Held*, that the taking of such deed by the assignee did not operate to release the mortgage, but it did operate as a payment on the note, to the extent of its value. Ibid. 469.

SALE UNDER FORECLOSURE.

Character of title existing in the purchaser, and when his title becomes absolute. See SALES, 2, 3, 4.

INSURANCE BY A MORTGAGOR. See INSURANCE, 1.

MORTGAGOR AND MORTGAGEE.

Continuance of that relation, under an agreement, upon foreclosure, to extend the time for redemption. See INSURANCE, 1 to 7.

CHATTEL MORTGAGES. See that title, *ante*.

MOTION.

WHEN THE REMEDY.

1. *Instead of a writ of error coram nobis*, which is not in use in this State, a remedy is given by motion in the court where, and during the term when, the error in fact occurs. *McKindley et al.* v. *Buck et al.* 488.

2. *In case of improper levy of attachment out of the county.* Where an officer in whose hands an attachment has been placed, improperly pursues the defendant and levies upon property out of his county, the defendant may have the levy set aside on a motion to quash it. Such a motion presents the question whether the officer might execute his writ on property permanently located in a different county from that in which the writ was issued, or whether a writ may be issued in one county and executed in another because the defendant may have intended to remove his property from the latter county. A plea in abatement, denying the affidavit, would put in issue the question of intention of removal alone, and not of the jurisdiction of the court. *House* v. *Hamilton*, 185.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 4 to 12 LICENSE 1, 2.

NATIONAL BANKS.

TAXATION THEREOF. See TAXES AND TAX TITLES, 13.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *As to safety of their engines.* In an action under the statute, by an administrator against a railroad company for wrongfully causing the death of the intestate, by means of the explosion of a locomotive, such company will be held to the highest degree of vigilance in regard to the condition of its machinery, and if the condition of an engine, in fact insecure, can be ascertained by the exercise of the highest diligence, the company will be held responsible, if it neglects to find out the fact. *Chicago and Alton R. R. Co.* v. *Shannon, Admr.* 339.

2. Where a certain locomotive engine was reported to the employees of the company having charge of its machinery, as unsafe, and after such report, they failed to ascertain its condition, the company cannot claim exemption by reason of such negligence on the part of its agents. Ibid. 339.

3. If a locomotive engine in use by a company is unsafe, actual knowledge of the fact by the persons having charge of the machinery of the road is not necessary in order to charge the company with the same liability as if such persons had had actual knowledge of the fact; it is sufficient if they had received such reports of its bad condition, as ought to have given them, by proper diligence, knowledge of the truth. Ibid. 339.

4. *Of sounding a bell or whistle at street crossings.* In an action against a railroad company for stock killed by one of its locomotive engines, near a street crossing, while running one of its trains through the corporate limits of a town,—*held,* that if such injury occurred before the train reached the street, and the bell or whistle of the locomotive was not sounded as required by the 38th section of the general railroad act, then, under the statute, the company was guilty of negligence, and liable for the injury occasioned thereby. *Toledo, Peoria and Warsaw Railway Co.* v. *Foster,* 415.

5. *When injury occurs at a place, where the statute requires no signal—common law governs.* And if the injury occurred after the locomotive had passed the street, and at a place where the statute does not require the signal to be given, in that case, it is a question for the jury to determine whether or not an omission to give the signal by sounding the bell or whistle amounts to such negligence as will render the company liable for the injury done. Ibid. 415.

6. *Injury to stock.* Gross or willful negligence on the part of a railroad company will make it liable for injury to an animal, even though the animal be improperly on the track. *Illinois Central Railroad Co.* v. *Wren,* 78.

7. If an animal is suddenly driven on the track by a dog, and there is no fault on the part of the engineer, the company will not be held responsible. Ibid. 78.

8. *Liability for negligently leaving open gate—and when not liable.* A railroad company is not required to keep a patrol on the line of its road to see that the gates at farm crossings are kept closed; but if its

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

employees, seeing such a gate open, do not close it, when not opened by a person to whom an injury afterward results, the company is liable for such injury. If, however, the gate is opened by the person injured, and by his neglect left open, no action will lie for an injury resulting to him by reason of such act and neglect. *Illinois Central Railroad Co.* v. *McKee*, 120.

9. *Fencing railroads — of the duty in respect thereto as distinguished from keeping a gate closed in the line of a fence.* See PLEADING AND EVIDENCE, 4, 5.

OF COMPARATIVE NEGLIGENCE.

10. *Railroad companies.* In actions against railroad companies for injuries inflicted by negligence, it is held, that the company is not liable if the plaintiff has been guilty of negligence which has contributed to the injury, unless it appears that the company has been guilty of negligence more gross than that of the plaintiff. That, in this class of actions, the jury may compare the degrees of negligence. *Illinois Central Railroad Co.* v. *Middlesworth*, 64.

NEGLIGENCE — WHETHER QUESTION OF LAW OR FACT. See PRACTICE, 2.

NEGOTIABLE PAPER.

OF PAYMENT THEREIN.

What constitutes such payment, and of the necessity of returning, or offering to return, the paper before suing upon the original consideration. See PAYMENT, 2 to 6.

NEW TRIALS.

VERDICT AGAINST THE EVIDENCE.

1. This court has repeatedly held, that unless the verdict of a jury is clearly against the evidence it will not be disturbed. It is their province to pass upon the issues of fact, and interference will only be had to prevent a plain perversion of justice. *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 337.

2. When there is a conflict of testimony among witnesses with equal means of information, and standing equally unimpeached, and the issues have been fairly left to the jury, their verdict will not be disturbed, if the record contains evidence upon which it can be reasonably based, even though there is adverse testimony which would seem to preponderate. Ibid. 337.

3. While great latitude must and is allowed juries in all actions for personal torts, yet it must be confined within some limits — no less for justice's sake than for the protection of the citizen; and where, in estimating damages, it is obvious the jury was actuated by improper motives, or where the amount of the verdict is so extravagantly large as to shock the mind, and it is plain that the jury could not have taken into consideration that the plaintiff was a man of bad character, the suit being

NEW TRIALS. VERDICT AGAINST THE EVIDENCE. *Continued.*
for malicious prosecution, the court will not hesitate to set the judgment aside, on the ground that the damages are excessive. *Walker et al.* v. *Martin,* 509.

4. In an action on the case against a railroad company for killing stock, when the damages given are greater than the proof allowed, the verdict will be set aside, as not warranted by the evidence. *Toledo, Peoria and Warsaw Railway Co.* v. *Arnold,* 418.

NEXT OF KIN.
WHO ARE "NEXT OF KIN."
1. *Under the act of* 1853, authorizing an action to be brought for the use of the widow or next of kin, where a person has met with death caused by the wrongful act, neglect or default of another, the phrase "next of kin" is a technical, legal one, and was used by the legislature in its technical sense; meaning here what it means elsewhere. And any rule laid down by this court, fixing "next of kin" within certain degrees of consanguinity, would be purely arbitrary, and mere judicial legislation. *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 339.

NON EST FACTUM.
WHAT IT PUTS IN ISSUE. See PLEADING AND EVIDENCE, 13, 15.

NON-JOINDER.
NON-JOINDER OF PARTIES PLAINTIFF.
In actions ex contractu — how taken advantage of. See PARTIES, 7.

NOTARY PUBLIC.
IS A COUNTY OFFICER.
And may take acknowledgments of deeds anywhere in his county. See ACKNOWLEDGMENT OF DEEDS, 2.

NOTICE.
WHEN NECESSARY, AND WHEN NOT.
1. *On changing an assessment of property for taxation.* See TAXES AND TAX TITLES, 20; INJUNCTIONS, 8.

2. *Where a third party assumes to pay all judgments of a certain character against another, no notice of the recovery of a judgment necessary.* See PLEADING, 5.

3. *Of amendment of officer's return.* See AMENDMENTS, 1.

OF OPENING A DECREE.
4. *Where there has been constructive notice only — whether notice of application to open decree necessary, and at what time it should be given.* See CHANCERY, 25, 26.

NOTICE UNDER LIMITATION LAWS.
5. *Effect of notice of adverse claims upon the rights of a party defending under limitation law of* 1839. See LIMITATIONS, 7.

GUARDIAN'S APPLICATION TO SELL LAND.
6. *When notice thereof sufficient.* See GUARDIAN AND WARD, 2.

NOTICE TO QUIT. See FORCIBLE ENTRY AND DETAINER, 1 to 4.

OFFICERS.

PRESUMPTION THEY DO THEIR DUTY.

1. In support of a bill for an injunction against public officers, this court will presume that they have performed their duties as required by law, where the record discloses no proof to the contrary. *Todemier et al.* v. *Aspinwall et al.* 402.

NOTARY PUBLIC.

2. *Is a county officer.* See ACKNOWLEDGMENTS OF DEEDS, 2.

OPENING DECREE.

WHERE THERE HAS BEEN CONSTRUCTIVE NOTICE. See CHANCERY, 34, 25, 26.

ORDINANCE.

OF A CITY ORDINANCE.

Its requisites. Where a city ordinance simply declares what shall constitute a misdemeanor, without prescribing any penalty therefor, no recovery can be had for violation of such ordinance. *Bowman et al.* v. *St. John*, 337.

PARENT AND CHILD.

DISPOSITION OF PROPERTY BY THE FORMER.

The power is unlimited. See WILLS, 3.

CONSIDERATION — DEED FROM PARENT TO CHILD.

Consideration not material. See CONSIDERATION, 1.

PAROL PARTITION. See PARTITION, 2, 3.

PARTIES.

IN SUITS AT LAW.

1. *In suits against railroads to recover penalty for failure to whistle or ring a bell.* Under our statute imposing a penalty of fifty dollars on railways for failure to sound a whistle or ring a bell for eighty rods before arriving at a crossing, the action may be brought either by the prosecuting attorney in the name of the people, or *qui tam* by an *informer*. *Toledo, Peoria & Warsaw Railway Co.* v. *Foster*, 480.

2. *Degree of proof required in such case, in an action qui tam.* See EVIDENCE, 15.

3. *Who may sue upon a subscription.* See SUBSCRIPTION, 4.

PARTIES IN CHANCERY.

4. *On bill filed to set aside a deed obtained by fraud.* The owner of land was induced by the fraudulent representations of a third person to convey the same to certain railroad companies, and afterward to such third person himself, the latter executing a deed to another who had notice of the fraud. The deed to the railroad companies was not delivered to any agent of the companies, but to a third person, nor did it appear that the companies had ever purchased the premises, paid any consideration or procured the exe-

PARTIES. PARTIES IN CHANCERY. *Continued.*

cution of the deed to them,—*held*, upon bill filed by the owner of the land to set aside these conveyances for fraud, the railroad companies were not necessary parties. *Radcliff et al.* v. *Noyes*, 318.

5. But persons holding mechanics' liens on the premises, created under contracts with the party claiming title through the alleged fraudulent conveyances, are necessary parties to such a bill. Ibid. 319.

6. Nor is the necessity of making the holders of such liens parties, obviated by an offer on the part of the complainant in his bill, to convey to them such portion of the premises as embraced the building they had erected, as they had a right to be heard upon the question of the extent of their liens. Ibid. 319.

MISJOINDER OF PARTIES PLAINTIFF.

7. *In actions upon contracts—how taken advantage of.* In actions on contracts, if there are too few or too many parties plaintiff, it is fatal to a recovery, and the objection may be taken either by plea in abatement, or as a ground of nonsuit, upon the trial, under the plea of the general issue. *Snell* v. *DeLand et al.* 323. See PLEADING AND EVIDENCE.

OF JOINT AND SEVERAL RIGHTS.

8. *Trespass by the cattle of two persons.* Where the cattle of two several parties go upon the field of another, and injure his crops, a joint action of trespass cannot be maintained against them. Each owner is separately liable for the injuries done by his own stock. *Westgate* v. *Carr*, 450.

RIGHT OF ACTION — WHETHER JOINT OR SEVERAL.

9. Where a deed is executed by several grantors jointly, but their interests in the premises conveyed are several and distinct, any one of them may bring his separate action for his share of the purchase money, if withheld. *Leake* v. *Brown*, 372.

GUARDIAN'S APPLICATION TO SELL LAND.

Wards not necessary parties. See GUARDIAN AND WARD, 3.

PARTITION.

ESTATES SUBJECT THERETO.

1. *Premises held in severalty.* To be the subject of partition under our statute, an estate must be held jointly, in common, or in coparcenary. Premises belonging in severalty to two, and no portion of them belonging jointly to both, are not subject to partition under our statute, or under any proceeding known in courts of equity. *McConnel* v. *Kibbe*, 12.

OF PAROL PARTITION BETWEEN TENANTS IN COMMON.

2. *Effect of it.* A parol partition of lands between tenants in common, when followed by a several possession, gives to each the rights and incidents of an exclusive possession of his property. *Tomlin* v. *Hilyard*, 300.

3. *Degree of proof required.* A mere severance of possession between tenants in common, may be inferred from far less proof than would be required to show a sale of land to a stranger. Ibid. 300.

4. *Right of each to compel a conveyance, upon a parol partition.* See CHANCERY, 9, 10.

PARTNERSHIP.

WHAT CONSTITUTES.

1. R., residing in Mississippi, made an offer in writing to M., a resident of Illinois, to form a copartnership in the buying and selling of twenty horses, the same to be purchased by M. and sent to R., to be sold by him in Mississippi, which said offer M. accepted, and, afterward, in transacting the business, purchased twenty-seven horses, all of which he disposed of at other places, and without the knowledge of R., and a loss occurred,—*held*, that M. could not maintain a bill as partner of R. for an accounting, or contribution for the loss sustained. *Metcalf* v. *Redmon*, 264.

2. Where A and B. as partners, and C and D, as partners, comprising distinct firms, make a contract with E to furnish him a certain quantity of wool, and agreed among themselves to share profit and loss in the speculation, each firm to furnish a certain proportion of the wool,—*held*, that as to such transaction, they could not be considered as partners between themselves, or as to third persons. *Snell* v. *DeLand et al.* 323.

3. *Not a mere joint enterprise.* Where a landlord furnishes the land, the teams, implements and grain to another, who performs the labor for a crop, to be divided, when matured, this does not create a partnership; so where one person furnishes material to be manufactured, and another employs the labor and skill in producing the result, and to be compensated by receiving a part of the manufactured articles, or a part of the proceeds when sold. *Parker* v. *Fergus*, 438.

4. It has been held, parties may engage in a joint enterprise and still not become partners, although they receive a portion of the profits. A party may receive a portion of the rents of a farm or tavern without becoming a partner. So of a clerk or an agent, who receives a portion of the profits on sales as a compensation for labor. So of a factor. So seamen may, by agreement, take a share in the profits of a whale fishing or coasting voyage as compensation for their services. To create a partnership, independent of express agreement, there must be an interest in profits as profits, and not as a mere means of payment for labor performed. Ibid. 438.

5. Where a party leases a portion of a building to be used as an opera house for a specified annual rent, and is employed to act as treasurer for the enterprise, to sell tickets, and, as rent of the house, to receive one-half of the proceeds resulting from the use of the portion used as an opera house, after deducting daily expenses, including his salary, to be deducted daily, the lessee to pay one-half of all taxes and assessments levied during the term,—*held*, that this does not create a partnership *inter se*, nor as to third persons, but it is a means of collecting his rents. Ibid. 438.

EVIDENCE OF PARTNERSHIP.

6. *Whether sufficient.* The statement by one of several defendants, that he was going into a house, nor the fact, that he occupied a portion of the house in the auction business, nor that he sold tickets for the other defendant's opera house, and acted as treasurer, and his name was printed on the bills as treasurer, prove that he was a partner in the opera house. Ibid. 437.

PAYMENT.

PAYMENT IN NEGOTIABLE PAPER.

1. *By certificate of deposit.* L., the payee of a certificate of deposit, which he had previously indorsed, offered it to B. in payment of a debt, which B. declined to receive. Whereupon L. stated that he was good for it, and would pay it if the payor named in such certificate did not, and thereupon B. took it; and the bank which had issued it suspended within two days thereafter. In an action by B. against L., to recover the original debt, *held*, that the receipt of such certificate by B. was not as payment, but taken merely as a means of obtaining the money from the bank upon the faith of A.'s declaration that he would pay it if the bank did not; and in no manner was it received upon the faith of A.'s indorsement, that having been made before it was offered. *Leake* v. *Brown*, 372.

2. *Necessity of returning or canceling such paper, taken as a means of obtaining the money.* In such case, it was not necessary for B. to return, or offer to return, the certificate. Ibid. 372.

3. Nor was it required that it should be canceled; on the contrary, it should not be, as it is the only evidence L. has of his deposit with the bank, and it cannot be enforced by a third person. Ibid. 373.

4. B. did all that the law required of him with regard to the disposition of such certificate, by surrendering the same to the court, to be disposed of as the court might think proper, after having used it in evidence. Ibid. 373.

5. By such surrender of it to the court, it virtually put it in the power of the payee, L., who, upon proper motion, could have obtained it. Ibid. 373.

6. In an action, brought upon the original consideration, when negotiable paper has been given in payment, it is not necessary, as in case of counterfeit or spurious money, that it should be returned, as it need not be done; but it must be shown that such paper is not outstanding, and that the maker is not liable to a second recovery upon it. Ibid. 373.

MUST BE MADE TO THE PROPER PERSON.

7. *The rule applied to the State treasurer.* A, the owner of certain bonds of this State, applied to the State treasurer for payment of the accrued interest thereon, which was refused, for the reason that said interest had been paid to one B, who had presented to the treasurer a power of attorney, properly acknowledged, and purporting to have been executed by A, authorizing such payment to be made to B. On petition by A for a peremptory *mandamus* to compel the treasurer to pay said interest to him, *held*, it appearing by the evidence that such power of attorney was never executed by A, and that he is the true owner of the bonds, payment of the interest on them by the treasurer to another and different person does not discharge the State. *The People ex rel. Clemens* v. *The Treasurer and Auditor*, 219.

8. If such power of attorney was not a forged one, and made by a person bearing the same name as A, but not the identical A to whom the

PAYMENT. MUST BE MADE TO THE PROPER PERSON. *Continued.*

bonds belonged, payment to such person simulating the true owner, is no payment. *The People ex rel. Clemens* v. *The Treasurer and Auditor*, 219.

9. In such case the treasurer took the risk of the identity of A, and if through his negligence A's identity was not established, and payment was made to the wrong person, it is no discharge of the State to the real party entitled to it. Ibid. 219.

10. *The general rule.* Where a custodian of money pays it out to the wrong person, of whose identity he is not assured, such payment, though made to one simulating the real party, is no bar to recovery by the latter. Ibid. 220.

ON REDEMPTION FROM JUDICIAL SALES.

To whom payment may be made when judgment debtor redeems. See REDEMPTION, 8.

To whom payment must be made when judgment creditor redeems. Same title, 5, 6.

PENALTIES.

TOWNS AND CITIES.

Of the amount which towns and cities may impose for a breach of ordinances. See CORPORATIONS, 6, 7.

PLEADING.

OF THE DECLARATION.

1. In an action brought upon a judgment, the declaration need not aver that the claim upon which the such judgment is founded was a just one. The original claim having been sanctioned by the judgment of a court of competent jurisdiction, the presumption is, that it was just. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.* 200.

2. *In action upon a judgment which a third party assumed to pay.* A party recovered a judgment against a railroad company for work and labor performed for it, and, upon the road being sold, the purchasers were incorporated by the legislature, the act providing as a condition precedent to their exercising any right under the charter that they should pay all judgments recovered against the former company for work done for it,— *held*, that in an action against the new company upon the judgment, no consideration need be averred or proved. It is sufficient, if it appear by proper averment, that the judgment was obtained for work and labor performed on the road, and that it has not been satisfied. Ibid. 200.

3. Nor was it necessary that there should have been an averment that the judgment had been surrendered or transferred to the defendant This the plaintiff was not bound to do, or offer to do, until an amount sufficient to satisfy the judgment had been tendered. Ibid. 200.

4. An averment in the declaration that the judgment sued upon had not been paid or satisfied, is equivalent to an allegation that it had not been settled or arranged, and under such allegation the defense was open to prove that it had been settled. Ibid. 200.

PLEADING. Of the declaration. *Continued.*

5. Under the act an averment of notice to the defendant of the existence of the judgment was not required. It was bound to ascertain what judgments, and the amount, it had become liable to pay, and to pay them before it took active possession of its franchise. *St. Louis, Alton and Terre Haute Railroad Co.* v. *Miller, Admr.* 200.

6. *Must state material facts.* The declaration, in every case, must contain a full and explicit statement of all the material facts upon which a recovery is sought, that the defendant may be prepared to meet them. *Illinois Central Railroad Co.* v. *McKee*, 120.

Of immaterial averments.

7. *Rendered material by tendering an issue upon them.* Where, in an action in assumpsit, upon two notes, the defendant pleaded certain torts by way of recoupment, which the plaintiff denied by his replication, — *held*, that the plaintiff, by tendering an issue upon them, made the matters thus pleaded a material subject of inquiry. Had he supposed no issue could be made up on the facts alleged, he should have demurred. *Streeter* v. *Streeter*, 155.

Plea to the consideration.

8. *Whether a plea of want of consideration, or failure thereof.* On demurrer to a plea in an action on a promissory note, when the plea sets forth that the note was given by one of the defendants, to secure the support of his mother during her natural life, and for no other consideration, and that by a parol agreement the note was to be surrendered at her death, as null and void, and that she was dead, — *held*, that such facts present a good defense when pleaded as a want of consideration. *Kirkpatrick et al.* v. *Taylor, Admr.* 207.

9. Had the note been originally valid, the parol agreement to surrender it could not destroy its effect, and viewed merely in that respect, and as a plea of failure of consideration, it would be demurrable. Ibid. 207.

10. That portion of the plea setting up the parol agreement, might be rejected as surplusage, and then the remaining facts in the plea pleaded as a want, instead of a failure of consideration, would have been good both in form and substance. Ibid. 207.

11. The plea being objectionable only for surplusage, and as having been drawn as a plea of failure instead of want of consideration, but this latter defect not having been assigned as cause of demurrer, the plea should have been permitted to stand. Ibid. 207.

Coverture.

12. *When and how may be pleaded in bar, or given in evidence.* Coverture, at the time of the entering into a contract upon which suit is brought, may be pleaded in bar, or given in evidence to defeat a recovery under the general issue *non assumpsit* or *non est factum*. *Streeter* v. *Streeter*, 156.

13. *When must be pleaded in abatement.* But, when coverture has taken place since the time of entering into the contract sued upon, it must be pleaded in abatement. Ibid. 156.

PLEADING. *Continued.*

PLEA JUSTIFYING AN ARREST.

14. *Under a city ordinance — its requisites.* A, who was city marshal, arrested B for violating a city ordinance against obstructing a street. In an action of trespass by B against A for making the arrest, A pleaded justification under the ordinance; but the ordinance, as set out in the plea, simply declared the obstructing of a street a misdemeanor, without declaring a penalty, or giving to municipal authorities jurisdiction of the offense. On demurrer to the plea, *held*, that such plea did not show that the city was entitled to recover a fine, impose a penalty, or issue process of any kind for the offense, and was therefore bad. *Bowman et al.* v. *St. John*, 337.

SPECIAL PLEA AMOUNTING TO GENERAL ISSUE.

15. *Obnoxious to special demurrer.* It is a well established rule of pleading, that if facts are alleged in a special plea which can be given in evidence under the general issue, such a plea is obnoxious to a special demurrer. *The Governor, for the use of Thomas*, v. *Lagow et al.* 135.

NON EST FACTUM, NOT SWORN TO.

In an action of debt — what may be proven thereunder. See PLEADING AND EVIDENCE, 13.

NON EST FACTUM, SWORN TO.

What it puts in issue. Same title, 15.

SURPLUSAGE.

Ground of special demurrer, only. See this title, 11.

STRIKING PLEAS FROM THE FILES. See PRACTICE, 3.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS.

1. *Must correspond.* Where the plaintiff in an action bases his right of recovery upon an alleged prescription, he must make out his case as he states it, by proving a prescriptive right, although to maintain his action it was not necessary to resort to prescription. *Rudd* v. *Williams*, 385.

2. Where a declaration proceeds for one cause of action, the plaintiff cannot recover by proving another and different cause of action. To recover, he must prove the averments of some one of the counts of his declaration. *Illinois Central Railroad Co.* v. *Middlesworth*, 65.

3. So in an action against a railroad company for damage to stock from the negligence of the company, it is necessary to prove negligence on the part of the company, producing the injury complained of, and for which a recovery is sought. Ibid. 67.

4. *As to the character of negligence alleged against a railroad.* Where, in an action against a railroad company for the killing of a horse, the declaration simply averred it to be the duty of the company to erect, maintain and keep in repair the fences on its roadway, and, that by means of neglect in keeping them in repair, the horse had strayed upon the track and was killed, — *held*, that testimony showing that the horse strayed upon the track through a gate at a farm crossing, which had been left open, was

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. *Continued.*
inadmissible, as the declaration contained no averment, that the gate was not kept closed. A plaintiff can only prove what he alleges. *Illinois Central Railroad Co.* v. *McKee*, 119.

5. Neglect in maintaining and keeping in repair a fence, whereby a person is injured in his property, is a ground of action totally distinct from that of carelessness in leaving open a gate on the line of the fence; and, when an action is predicated upon the latter ground, it must be so averred in the declaration. Ibid. 119.

6. *As to the date of a note — under a special count.* Where a note is described in the declaration as bearing date April 6, 1864, and the one produced in evidence bears date September, 6, 1864, such variance is fatal. The date of a note is a matter of essential description, and must be precisely proved. *Streeter* v. *Streeter*, 155.

7. *Under the common counts.* But, in such case, if the execution of the note is proved, the question of variance cannot be raised, as such note is then admissible in evidence under the common counts. Ibid. 155.

8. *Misjoinder or non joinder of parties plaintiff.* Parties suing as joint contractors must show a joint interest in the contract. *Snell* v. *De Land et al.* 323.

9. The allegations and proofs must correspond — alleging that four persons, plaintiffs, made the contract declared on, with the defendant, is not supported by proof that but three of them made it, or that the four named made it, together with another not named. Ibid. 323.

10. And section 7, chapter 40, of the act entitled, "Evidence and depositions," does not change the common law in this respect; it simply dispenses with certain proofs, which, at common law, persons suing as joint obligees, partners or payees were required to make, under the general issue. Ibid. 323.

EVIDENCE UNDER THE COMMON COUNTS.

11. *Promissory notes.* A promissory note, the execution of which has been proven, is admissible in evidence under the common counts. *Streeter* v. *Streeter*, 155.

EVIDENCE UNDER THE GENERAL ISSUE.

12. In actions *ex contractu*, the non-joinder or misjoinder of plaintiffs may be taken advantage of under the general issue. *Snell* v. *De Land et al.* 323

13. *Non est factum, not sworn to, in debt.* Where the plea of *non est factum*, not sworn to, was interposed in an action of debt, being the general issue, it put in issue every fact in relation to the execution of the bond, except the fact of the signature of the pleader, and therefore the fact that other signatures either as sureties or witnesses, were wrongfully placed on the bond, after that of the pleader, could properly be given in evidence under such a plea; and hence, a special plea alleging these facts is bad on special demurrer. *The Governor, for the use of Thomas*, v. *Lagow et al.* 135.

14. *Coverture*, existing at the time of entering into a contract upon which suit is brought, may be pleaded in bar, or given in evidence to defeat a

PLEADING AND EVIDENCE.

EVIDENCE UNDER THE GENERAL ISSUE. *Continued.*

recovery, under the general issue *non-assumpsit* or *non est factum*. *Streeter* v. *Streeter*, 156.

EVIDENCE UNDER CERTAIN ISSUES.

15. *Non est factum — what it puts in issue.* The plea *non est factum*, sworn to, denying a guaranty written over the name of the assignor, who is payee, of a promissory note, puts in issue, and casts upon the plaintiff the burden of establishing, that the assignor contracted as guarantor. *Dietrich* v. *Mitchell* 40.

16. *In trover against one claiming under a chattel mortgage — proof required of defendant's right of possession, and what will be sufficient.* See CHATTEL MORTGAGES, 3.

PROCEEDING TO CONTEST A WILL.

Of proper evidence of undue influence upon the testator, of his mental capacity, and as to his signing the will. See WILLS, 11, 12, 13.

POSSESSION.

WHEN IT SHOULD NOT BE DECREED.

1. In a suit in chancery to set aside a conveyance of land alleged to have been procured to be made by the complainant by fraud, if it appear that persons who were not made parties to the bill, held mechanics' liens upon the premises, and that they had obtained decrees for the enforcement of such liens, it is error to decree that any persons occupying the premises should surrender the possession to the complainant, as it might be those in possession had entered as purchasers under sales to satisfy the liens. *Radcliff et al.* v. *Noyes*, 319.

ADVERSE POSSESSION OF LAND.

2. *In what cases a court of chancery will decree the surrender thereof.* See CHANCERY, 1, 2.

POWERS.

OF DELEGATED POWERS.

1. *Of the manner of their exercise.* It is a familiar principle, that, in the exercise of delegated power, all acts within the scope of the authority will be sustained, where such acts can be separated from those in excess or outside of the power. But, where the acts within the power are so intimately connected with those outside of the power, that they cannot be separated, then the entire action of the agent or officer must fail. *The State* v. *Allen*, 456.

2. *Application of this principle to the levy of taxes by municipal corporations.* See TAXES, etc. 11, 12.

PRACTICE.

QUESTIONS OF LAW AND FACT.

1. *Whether a rule adopted by a railroad company is a reasonable one.* It is error for a court to submit to the jury the question whether a rule

PRACTICE. QUESTIONS OF LAW AND FACT. *Continued.*

adopted by a railroad for the government of its business, is a reasonable one or not. Such question is one purely of law, and must be determined by the court. *Illinois Central Railroad Company* v. *Whittemore*, 420.

2. *Of negligence.* Negligence is a question of fact, except when it consists in the omission of a duty imposed by positive requirement of law. *Toledo, Peoria and Warsaw Railway Company* v. *Foster*, 416.

STRIKING PLEAS FROM THE FILES.

3. When a plea is filed, which has nothing to do with the declaration, it should be stricken from the files on motion, or by the court *sua sponte*. *Leake* v. *Brown*, 372.

MODE OF ARGUING A CAUSE.

4. *Privileges of counsel.* While this court can perceive no valid reason for prohibiting counsel from arguing the case of a contested will in his own way before the jury, so long as he confines himself to the evidence and the legal principles involved, and is respectful and decorous, still it does not appear that to refuse to permit the counsel to show the will to the jury on the argument, was an error for which the decree should be reversed. *Brownfield et al.* v. *Brownfield et al.* 148.

STIPULATIONS.

5. *As to character of decree to be entered.* Where the parties to a suit enter into a stipulation, and agree that a decree shall be entered therein according to the case made by the pleadings, and that said decree shall be entered of the term at which said agreement was made,— *held*, that the agreement being a mutual one, neither party could take any further steps in the cause, and that a decree should have been entered in conformity with it. *Coultas* v. *Green*, 277.

VERBAL AGREEMENT.

6. *To dismiss suit.* This court has held, in a suit at law, that a verbal agreement between the parties to dismiss the suit, must be complied with. Ibid. 277.

STAY OF PROCEEDINGS OUT OF TERM.

7. *The statute applies only to "parties."* Section 46 of the practice act of 1845, authorizing "a party" out of term, intending to move to set aside or quash any execution, replevin bond or other proceeding, to apply to a judge at his chambers, for an order staying proceedings, as preliminary to a motion to be made in term time, to quash the same, applies only to "a party" to the proceedings sought to be quashed. *Bonnell* v. *Neely*, 288.

8. Persons who are not parties to the proceedings thus sought to be set aside, cannot, by the summary means of a motion, assert adverse rights. Such rights can only be adjusted by the aid of regular proceedings. Ibid. 288.

9. Under this statute, where there has been an abuse of the process, as between the parties to the proceedings, this summary remedy, by motion, is allowed; but strangers to the proceedings cannot assert their rights in this manner. Ibid. 288.

PRACTICE. *Continued.*

TIME OF MAKING CERTAIN OBJECTIONS.

10. *Want of security for costs.* After issue joined, and the cause has been called for trial, a motion for a rule on the plaintiff to file security for costs comes too late. *St. Louis, Alton and Terre Haute Railroad Co.* v. *South*, 177.

DEFAULT FOR WANT OF A PLEA.

11. *After demurrer overruled — effect of such default.* See DEFAULT, 1.

PRACTICE IN THE SUPREME COURT.

WHAT MAY BE ASSIGNED AS ERROR.

1. *Only matters which concern the parties.* Where there are adult and infant defendants, and the writ of error is in fact prosecuted by the adults alone, they cannot assign for error those proceedings which only affect the interests of the infants. *Rhoads, Exr.* v. *Rhoads et al.* 240.

DIMINUTION OF THE RECORD.

2. *Remedy therefor.* Where a record comes to this court properly certified it must be presumed to be correct, and the case will be tried upon it as thus certified. If, however, either party may wish to have it amended, by the insertion of some portion omitted by the clerk, or which that officer has copied incorrectly into the record, he should suggest a diminution of the record, and apply for a writ of *certiorari* to have the omitted portion returned, and thus have the transcript corrected. *Toledo, Peoria and Warsaw Railway Co.* v. *Town of Chenoa*, 210.

ERROR WILL NOT ALWAYS REVERSE.

3. *Curing erroneous instructions.* In trespass against several, an instruction that the jury may find damages against them severally, is erroneous, but such error is cured by the entry of *nolle prosequi* before judgment upon the verdict, against all the defendants but one, and taking judgment against him alone. *St. Louis, Alton and Terre Haute Railroad Co.* v. *South*, 177

PRE-EMPTION.

THE LAW MUST CONTROL.

1. *Not the rules of the commissioner.* Individuals rely for the protection of their rights on the law, and not upon the regulations and proclamations of the departments of government, or officers who have been designated to carry the laws into effect. *Baty et al.* v. *Sale*, 351.

2. It is therefore sufficient to comply with the requirements of the law itself in the pre-emption of land, to entitle a party to his rights under that law, and any other conditions superadded by the commissioner of the general land office, cannot affect his rights. Ibid. 351.

3. Hence, where a claim for pre-emption was filed, and the lands were afterward withdrawn from market for a short period, a failure by the pre-emptor to comply with a rule of the general land office requiring the application to be renewed in such cases could not affect his rights, there being nothing in the law itself to require such a renewal. The officers of the

PRE-EMPTION. THE LAW MUST CONTROL. *Continued.*

land office are powerless to annex conditions or provisions to the law. *Baty et al.* v. *Sale*, 351.

4. To avail himself of the benefits of the pre-emption laws, a person must comply with the conditions they impose. It is a favor bestowed only on the terms prescribed by the statute. Ibid. 351.

COMPUTATION OF TIME.

5. *Under the pre-emption laws.* Under the act of September 4, 1841, section 15, where a person settles upon and improves a tract of land, subject at the time to private entry, files his declaration of intention within thirty days thereafter, and then within twelve months after the date of such settlement, makes proof and payment as therein required, he may thus become the purchaser. The manifest intention is to give the pre-emptor an entire year, while the land was subject to entry, within which to make his final proof and to complete his purchase. Ibid. 351.

6. Hence, where land was temporarily withdrawn from the market, after a party had filed his declaration of an intention to pre-empt it, the officers of the land office did right in excluding the time the land was not subject to entry, in computing the year within which he had the right to make his proof and enter the land. Ibid. 351.

PRESCRIPTION.

WHEN THE RIGHT EXISTS.

Proof that a mill was erected, flumes made for it, and its wheels put in, within ten years prior to the assertion of a prescriptive right by the proprietor to the use of the water of the stream upon which the mill stood, will not be sufficient to establish such a right. *Rudd* v. *Williams*, 387.

PRESUMPTIONS.

PRESUMPTIONS OF LAW AND FACT.

1. *That evidence was considered.* Where it was asked to have certain evidence, which was incompetent, excluded, and the court reserved the question until all the evidence was heard, and then rendered a decree dismissing the bill, without formally excluding it, it will be presumed, that such evidence was considered by the court, in rendering the decree, unless it appears in the decree that it was not. *Heartrunft et al.* v. *Daniels et al.* 369.

2. *As to ground of discharge upon habeas corpus, when no reason appears.* See HABEAS CORPUS, 1.

3. *Public officers presumed to do their duty.* See OFFICERS, 1.

4. *Authority of attorney at law to prosecute a suit — when presumed.* See ATTORNEY AT LAW.

5. *Presumption as to ownership of personal property in possession of a married woman, as between husband and wife.* See MARRIED WOMEN, 4.

6. *Of indorsements in blank — presumption as to character of liability thereby assumed* See ASSIGNMENT, 2, 3.

PRESUMPTIONS. PRESUMPTIONS OF LAW AND FACT. *Continued.*

7. *As to sufficiency of a guardian's bond from recital in the order of appointment.* See GUARDIAN AND WARD, 1.

8. *Presumptions in favor of the validity of a will.* See WILLS, 14.

PRIVILEGED COMMUNICATIONS. See ATTORNEY AT LAW, 3.

PROBATE COURT.

OF ITS EQUITABLE JURISDICTION. See JURISDICTION, 1.

PROCESS.

AMENDING RETURN UPON PROCESS. See AMENDMENTS, 1.

PURCHASERS.

PURCHASER PENDENTE LITE.

Bound by the judgment or decree. Judgments and decrees bind equally parties and privies, and a purchaser *pendente lite* stands in the latter category *Dickson* v. *Todd et al.* 505.

WHO MAY BE PURCHASERS.

Of administrators and others, occupying a fiduciary relation. See ADMINISTRATION OF ESTATES, 1, 2, 3.

PURCHASER AT JUDICIAL SALES.

Of his title — its character — and when it becomes absolute. See SALES, 2, 3, 4.

PURCHASER OF MORTGAGOR'S EQUITY OF REDEMPTION.

Not liable to pay the mortgage debt. See MORTGAGES, 8.

Time allowed him to redeem under a sale on foreclosure. See REDEMPTION, 9.

RAILROADS.

MAY MAKE REASONABLE RULES.

1. *To be observed by passengers.* A railroad company has the right to require of its passengers the observance of all reasonable rules, calculated to insure comfort, convenience, good order and behavior, and secure the safety of its trains, and the proper conduct of its business as a common carrier. *Illinois Central Railroad Co.* v. *Whittemore*, 421.

WHAT IS A REASONABLE RULE.

2. *Surrender of tickets.* A rule adopted by a railroad company, requiring passengers to surrender their tickets to the conductor when called for, is a reasonable one, and may be enforced. Ibid. 421.

EXPULSION OF PASSENGERS.

3. *For violation of rules — a common law right.* When a passenger wantonly disregards any reasonable rule, the obligation to transport him ceases, and the company may expel him from the train, using no more force than may be necessary for such purpose, and not at a dangerous or inconvenient place. This is a common law right, and has been restricted by statute only in cases of non-payment of fare. Ibid. 421.

4. *Refusal to surrender ticket.* The refusal of a passenger to surrender his ticket to the conductor when demanded, does not constitute the same

RAILROADS. EXPULSION OF PASSENGERS. *Continued.*

offense as the non-payment of fare, and the statutory prohibition against the expulsion of passengers for the latter offense, except at a regular station, does not apply to the former case. *Illinois Central Railroad Co.* v. *Whittemore*, 421.

5. A railroad company may expel a passenger from its train, at a place other than a regular station, for the violation of any reasonable rule, other than that of non-payment of fare. Ibid. 420.

6. The statute forbids the expulsion of a passenger at a place other than a regular station, only in case of a refusal to pay fare. And neglect by a passenger to purchase a ticket before entering the train, when required by the rules of the company, in substance amounts to a refusal to pay fare, and justifies an expulsion only at a regular station. Ibid. 420.

KEEPING OPEN TICKET OFFICE.

7. *The rule in former decisions.* The cases of the *Chicago, B. & Q. R. R. Co.* v. *Parks*, 18 Ill. 460, and *The St. Louis, Alton & Chicago R. R. Co.* v. *Dalby*, 19 ib. 353, are not to be considered as deciding the law to be, that a railroad company is bound to keep open its office for the sale of tickets to passengers, beyond the time fixed by its published rules for the departure of the train. *St. Louis, Alton and Terre Haute Railroad Co.* v. *South*, 176.

8. *Not required to keep open their ticket office beyond the time fixed for the departure of trains.* Railroad companies are required to keep open their office for the sale of tickets to passengers for a reasonable time before the departure of each train, and up to the time fixed by its published rules for its departure, and *not* up to the time of *actual* departure. Ibid. 176.

9. *But must afford proper facilities.* They are required to furnish a convenient and accessible place for the sale of tickets, and afford the public a reasonable opportunity to purchase them, and parties who will not avail themselves of it are alone at fault, and must pay the extra fare, or, on refusal, be ejected from the train. Ibid. 176.

DISCRIMINATING IN FARES.

10. *Of the right to charge discriminating fares — dependent on what fact.* While the right of a railroad company to discriminate in its fare between those purchasing tickets and those who do not, is just and reasonable, still, such right depends on the fact that a reasonable opportunity has been given to obtain tickets at the lowest rate. Ibid. 176.

PASSENGERS UPON FREIGHT TRAINS.

11. *Right of expulsion therefrom.* Where a railroad company regularly carries passengers by a freight train, and so holds itself out to the public, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train. *Chicago and Alton Railroad Co.* v. *Flagg*, 364

MAY REQUIRE TICKETS TO BE PURCHASED.

12. Railroad companies have the power to make all reasonable rules for the government of their trains; and, as to certain classes of trains, they

RAILROADS. MAY REQUIRE TICKETS TO BE PURCHASED. *Continued.*
may require tickets to be purchased before entering the train. *Chicago and Alton Railroad Co* v. *Flagg*, 364.

FAILURE TO BUY TICKETS.

13. *Penalty therefor.* A passenger who knowingly disregards the rule requiring tickets to be purchased before taking passage, is upon the same footing with one who refuses to pay fare, and may be expelled at any regular station. Ibid. 364.

FACILITIES FOR BUYING TICKETS.

14. *Must be afforded.* When a railroad company requires tickets to be purchased at the station, facilities must be furnished to the public, by keeping open the ticket office a reasonable time prior to the time fixed for the departure of the train, and a failure to do so gives the right to a person desiring to take passage to enter the train and be carried to his place of destination by payment of the regular fare to the conductor; and, under such circumstances, his expulsion would be unlawful. Ibid. 364.

PLACES AT WHICH PASSENGERS MAY BE EXPELLED.

15. *Only at a regular station.* When a passenger willfully neglects to purchase a ticket as required, he cannot be expelled at a place other than a regular station. Ibid. 364.

16. A water tank, even if a "usual stopping place for trains," is not, within the spirit of the law, a regular station. A regular station means the usual stopping place for the discharge of passengers; and a local usage, adopted by persons, of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a regular station for the discharge of passengers. Ibid. 364.

17. The phrase "usual stopping place," means in the statute, a regular station for passengers to get on and off the trains. Ibid. 364.

NEGLIGENCE. See NEGLIGENCE.

SAFETY OF THEIR ENGINES.

Degree of vigilance required in respect thereto. See NEGLIGENCE, 1, 2, 3.

ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD.

Of its obligation to pay judgments against the Terre Haute, Alton and St. Louis Railroad company. See CORPORATIONS, 1, 2.

ST. LOUIS, JACKSONVILLE AND CHICAGO RAILROAD.

Of the grant in its charter of lands owned by the State — what is embraced therein. See GRANT, 1, 2, 3.

RECEIPTS.

PAROL EVIDENCE.

Tax receipts subject to explanation by parol. See EVIDENCE, 4.

RECOGNIZANCE.

CONTINUANCE THEREOF.

1. *By operation of law.* In case a term of court is not held at the regular time, recognizances, like other proceedings, stand continued to the next term. *Norfolk et al.* v. *The People*, 7.

RECOGNIZANCE. *Continued.*

DEMURRER TO SCI. FA.

2. *What questions are presented thereby.* A demurrer to a *scire facias* upon a recognizance only reaches matters appearing upon the record, and not matters outside of and not presented by it. The court cannot know judicially, on a demurrer, that a regular term of court was not held, or that a Special Term was held. The terms being fixed by law, it will be presumed they were held, and if not, the fact should be averred and proved, and so of holding a Special Term. *Norfolk et al.* v. *The People*, 9.

FORFEITURE OF RECOGNIZANCE.

3. *At what term it may be taken.* Under our statute the people are not bound to take a forfeiture at the first term, but if it is continued, a forfeiture may be had at a subsequent term. If the sureties wish to terminate their liability they have the power to do so, by surrendering their principal at the return term or in vacation. If court is not held at the term to which the recognizance is returnable, or if the cause is continued, a forfeiture may be subsequently had, and such an objection is not ground of demurrer. Ibid. 9.

LIEN UPON REAL ESTATE.

When it attaches under a recognizance. See LIEN, 1, 2.

RECORDING ACT.

ITS OPERATION UNDER LIMITATION LAWS. See LIMITATIONS, 7.

RECOUPMENT. See SET-OFF, 2 to 6.

REDEMPTION.

REDEMPTION BY A JUDGMENT CREDITOR.

1. *Of the rights acquired thereby.* A judgment creditor redeeming from a prior judicial sale, is subrogated to the rights of the purchaser from whom he redeems. The case of *Williams* v. *Tatnell* (29 Ill. 565), does not militate with this rule. *Lamb* v. *Richards, Admx.* 315.

2. So where A mortgaged certain lands to B, and subsequently conveyed the same to C, who in turn mortgaged them to D, and then A died, and B foreclosed his mortgage, making the heirs and administrator of A and the grantees, mortgagors and mortgagees, subsequent to his mortgage, parties to the suit, and the premises were sold to B on the foreclosure decree, who held the certificate of purchase until after the lapse of twelve months from the time of sale, without any person attempting to redeem within that time, — *held*, that B, after the lapse of twelve months from the time of sale, held the mortgaged property discharged of all right in any person, entitled by statute to redeem within such period; and, that in such case, where E, a judgment creditor, in good faith redeemed from B, before the lapse of fifteen months from the day of sale, E, by such redemption, was subrogated to all the rights of B, and took the property discharged of any right in any person allowed by statute to redeem within one year after sale made. Ibid. 312.

REDEMPTION. REDEMPTION BY A JUDGMENT CREDITOR. *Continued.*

3. *Must conform to the statute.* The right of redemption is statutory, and must be exercised in pursuance of the statute, otherwise it will be ineffective. *Littler* v. *The People ex rel. Hargadine*, 188.

4. The statute declares, that after the expiration of twelve months, and at any time before the expiration of fifteen months from the sale of the premises, any judgment creditor may redeem the same in a certain manner therein specified; and a judgment creditor seeking to acquire rights under this statute, must comply substantially with all its requirements. Ibid. 188.

5. *Payment must be made to the sheriff.* The statute requires, that when redemption is sought by a judgment creditor, the redemption money must be paid to the sheriff in whose hands the execution is placed, such sum being held as a bid upon the lands. Ibid. 188.

6. *Payment to a person other than the sheriff, irregular.* And when, in such case, a judgment creditor paid the redemption money to the master in chancery, who made the sale, *held*, that the redemption was irregular; that payment should have been made to the sheriff, as required by law, and having been made to a person unauthorized to receive it, it could not be ratified by the sheriff, so as to make it effective. Ibid. 188.

7. *Subsequent reversal of the judgment under which redemption was made—its effect.* It was held in *McLagan* v. *Brown*, 11 Ill. 519, that a judgment creditor who redeems from a prior sale acquires a valid title to the premises redeemed, even though the judgment, by virtue of which he acquired the right to redeem, has been subsequently reversed. But the doctrine of this case has not been acquiesced in by subsequent decisions. (*Turney* v. *Turney*, 22 Ill. 253; *Williams* v. *Tatnall*, 29 id. 552.) Ibid. 192.

REDEMPTION BY JUDGMENT DEBTOR.

8. *To whom payment may be made.* When redemption is sought by a judgment debtor, payment may be made to the master in chancery, who made the sale; or to any other officer of the law, who, by his official bond, is bound for such payment. Ibid. 189.

PURCHASER OF MORTGAGOR'S EQUITY OF REDEMPTION.

9. *Time allowed him to redeem from sale on foreclosure.* Under the statute a mortgagor has twelve months within which to redeem the premises sold under a decree of foreclosure, and the purchaser of the equity of redemption succeeds to the same rights, and where he is made a party to a foreclosure, he must redeem within that time or be barred. Not being a judgment creditor he cannot claim a longer period. *Dunn* v. *Rodgers et al.* 260.

PURCHASER FROM MORTGAGOR.

Of an agreement, upon foreclosure, to extend the time for redemption. See INSURANCE, 2 to 7.

RELEASE.

RELEASE OF A MORTGAGE.

What constitutes. See MORTGAGES, 11.

RELEASE. *Continued.*

RELEASE OF SURETY.

By an extension of time to the principal. See SURETY, 2, 3.

REMEDIES.

TO RECOVER PENALTY AGAINST RAILROADS.

For neglect to sound a whistle or ring a bell when required by law. See PARTIES, 1.

WRIT OF ERROR CORAM NOBIS.

Not in use in this State. See WRIT OF ERROR CORAM NOBIS, 1.

REMEDY BY MOTION.

Instead of a writ of error coram nobis. See MOTION, 1, 2.

REMEDY UPON A STATUTORY LIABILITY.

When the statute provides none. See ACTION, 1, 2.

REMEDY UPON A JUDGMENT RECORD.

By action of debt. See DEBT, 1.

TO SET ASIDE AN IMPROPER LEVY.

Whether by motion to quash or plea in abatement. See MOTION, 1, 2.

TO IMPEACH A DECREE.

Not by affidavits, without bill filed. See DECREE, 2.

OPENING OF A ROAD BEFORE DAMAGES ADJUSTED.

Remedy by injunction. See INJUNCTION, 6.

INTRUSION OF CLERGYMAN INTO A CHURCH.

Remedy by injunction. See CHURCHES AND CHURCH PROPERTY, 3, 4.

INVASION OF RIPARIAN RIGHTS.

Whether the remedy is at law or in chancery. See INJUNCTIONS, 3, 4, 5.

RENTS AND PROFITS.

FROM WHAT TIME ALLOWED.

On the statement of an account. The general rule upon the question, as to the time from which rents and profits are allowed, is, that, where there has been great *laches* on the part of the complainant, and the defendant has not been guilty of positive fraud, the account will only be taken from the commencement of the suit; but where the complainants are infants, and there has been no *laches* in filing the bill, or the defendant is charged with fraud, the account will be carried back to the time when the fraudulent possession began. There is, however, no fixed rule upon this question. Each case depends upon its own circumstances. *Miles et al.* v. *Wheeler et al.* 124.

REPLEVIN.

OF THE BOND.

1. *When an alias writ is executed by a different officer.* A sheriff took a replevin bond, and, his term of office expiring, the writ was returned without being executed. An *alias* writ being issued, was executed by his

REPLEVIN. OF THE BOND. *Continued.*
successor, without taking a new bond. *Held*, that an action could be maintained on the bond taken by the first sheriff. *Petrie* v. *Fisher et al.* 442.

2. *The object of a replevin bond*, under our statute, is not merely to indemnify the sheriff, but also to furnish an additional remedy to the defendant in case the plaintiff fails to prosecute his suit with effect. Ibid. 442.

RES ADJUDICATA.
WHAT CONSTITUTES.
The holder of certain lots of ground by contract of purchase, conveyed the same by deed to another person, but before that deed was recorded the grantor therein procured his vendor to convey the premises to a trustee to secure certain indebtedness of the former, and on default in payment the premises were sold under the deed of trust, a third person becoming the purchaser. The grantee in the first deed then filed his bill in chancery, claiming title to the premises, and the right to redeem from the sale under the trust deed, and on a hearing that bill was dismissed. Pending that suit a judgment was recovered against the complainant therein, and his interest in the lots was levied upon and sold, and the title passed by means of a redemption by a judgment creditor, and a transfer of the sheriff's certificate to a third person, to whom the sheriff made a deed. A subsequent grantee, under the title derived through the sale under the deed of trust, filed a bill against the holder of the title derived under the execution sale, to remove the cloud upon the title of the complainant created thereby, whereupon the defendant filed his cross-bill, claiming the right to redeem from the trust sale, and thereby to acquire the title to the premises. It was *held*, that the rights of the defendant in the last suit, holding as a purchaser *pendente lite* under the title of the complainant in the first suit, were fully adjudicated and settled by the decree in such former suit. *Dickson* v. *Todd et al.* 504.

RESCISSION OF CONTRACTS.
IN EQUITY — FOR FRAUD. See CHANCERY, 16.

RESTRAINT OF TRADE. See LICENSE, 2.

REVENUE. See TAXES AND TAX TITLES.

REVERSAL OF JUDGMENT.
UNDER WHICH JUDGMENT CREDITOR HAS REDEEMED.
Effect thereof on the title of the party redeeming. See REDEMPTION, 7.

REVIVOR OF JUDGMENTS.
ON DEATH OF THE DEFENDANT.
Whether revivor necessary before execution can issue, when there is no executor or administrator. See EXECUTIONS, 1.

RIGHT OF PROPERTY.
APPEALS FROM TRIALS THEREOF. See APPEALS, 1, 2.

RIPARIAN RIGHTS.

OF DIFFERENT PROPRIETORS.

1. *Their respective rights in the use of water.* Priority of use of the water of a stream by a riparian proprietor gives no exclusive right. *Bliss et al.* v. *Kennedy et al.* 68.

2. The rule is, where two factories are located on the same stream, so far as the water is destroyed by being converted into steam, neither is entitled to its exclusive use; it is to be divided between them as nearly as may be according to their respective requirements; if each factory requires the same quantity of water it should be equally divided; but, while the water is incapable of being thus divided with mathematical exactness, if the jury should find that the upper factory has used more than its reasonable share, or has diverted the water from its natural channel, after using it, or so corrupted it as to deprive the lower proprietor of its use to such a degree as to cause a material injury to that factory, it would be ground for damages, and ultimately for an injunction. Ibid. 68.

OF THE RIGHT OF FISHERY. See FISHERY.

REMEDY — JURISDICTION.

Whether the remedy is at law or in chancery, for an invasion of riparian rights. See INJUNCTIONS, 3, 4, 5.

ROADS. See HIGHWAYS.

ROAD TAX.

SCHOOL DIRECTOR NOT EXEMPT. See TAXES, 9.

SALES.

SALE UPON CONDITION.

1. *Who to decide upon the condition.* Where a party purchased of another a fanning mill, with an agreement that he might return it within thirty days if it did not suit him, he became the sole judge under the contract, as to whether it suited. That question did not depend upon the opinion or judgment of others. *Goodrich* v. *Van Nortwich*, 445.

JUDICIAL SALES.

2. *Character of title passing to purchaser.* In this State, a purchaser at sheriff's or master's sale acquires only a lien; no new title vests until the period of redemption has passed. *Stephens* v. *Ill. Mut. Fire Ins. Co.* 328.

3. But, his deed will relate back to the beginning of his lien, in order to cut off intervening incumbrances. The title only becomes absolute when the right to a deed accrues. Ibid. 328.

4. By a sale under a decree of foreclosure, the estate of the mortgagor remains the same, with this qualification, that the decree and sale, the amount and time of redemption, have become fixed, and a failure to redeem within the allotted time, divests his estate. Ibid. 328.

OF SALES IN FRAUD OF CREDITORS. See FRAUD, 1, 2.

SCHOOL DIRECTOR.

NOT EXEMPT FROM ROAD TAX. See TAXES, 9.

SET-OFF.

BANKER — HOLDER OF A CHECK.

1. A banker cannot set off a demand he holds against the person presenting a check for payment. When a check is received in the usual course of business, it is not presumed to be received in payment, but rather as a means to procure payment. The holder becomes the agent to collect the money of the drawer, and if not guilty of negligence that injures the drawer, the holder will not be answerable if the banker refuses payment. In a suit against the drawer, the holder may treat it as a nullity, and resort to the original cause of action. To hold otherwise would greatly embarrass the business of the commercial world. *Brown* v. *Leckie et al.* 498.

RECOUPMENT.

2. *When allowable.* It is not necessary the opposing claims should be of the same character in order that they may be adjusted in one action by recoupment. *Streeter* v. *Streeter*, 156.

3. A claim originating in contract may be set up against one founded in tort, if the counter claims arise out of the same subject-matter, and are susceptible of adjustment in one action. Ibid. 156.

4. And the converse of this proposition is true, that damages for a tort, in relation to the same subject-matter on which the suit on the contract is brought, may be adjusted in that action by recoupment. Ibid. 156.

5. *Concerning its benefits.* The doctrine of recoupment tends to promote justice, prevents needless litigation, avoids circuity of action and multiplicity of suits, by adjusting in one action adverse claims growing out of the same subject-matter. Ibid. 156.

6. *No recovery over.* But unlike the case of a technical set-off, no excess can be recovered. Ibid. 156.

SPECIFIC PERFORMANCE. See CHANCERY, 5 to 11.

STAMP ACT.

WHEN STAMP UNNECESSARY.

Upon a supplemental agreement. See CONTRACTS, 10.

STATUTES.

WHETHER PROPERLY PASSED.

1. *Published laws — prima facie evidence.* The laws certified by the secretary of State, and published by the authority of the State, must be received as having passed the legislature in the manner required by the Constitution, unless the contrary appears. *Illinois Central Railroad Co.* v. *Wren*, 77.

2. *Legislative journals — in what manner brought to the attention of the court.* If parties seek to raise the question as to whether the yeas and nays were duly called upon the passage of an act, it is not sufficient to refer the court to the journal, with the expectation that the court will take

STATUTES. WHETHER PROPERLY PASSED. *Continued.*
judicial notice of all the facts that it discloses. *Illinois Central Railroad Co.* v. *Wren*, 77.

3. Although the court will take judicial notice of all acts of the legislature signed by the governor, and found in the office of the secretary of State, and although for some purposes the court may take judicial notice of the legislative journals, yet it is not the province of the court, at the suggestion or request of counsel, to undertake to explore the journal for the purpose of ascertaining the manner in which a law duly certified went through the legislature, and into the hands of the governor. Ibid. 77.

4. If parties desire to show that a law has been passed without calling the yeas and nays, they must make the requisite proof of that fact, by means of the legislative journals, and introduce that proof into the record. A duly authenticated copy of so much of the original journals as shows the facts relied upon by counsel for impeaching a law *prima facie* valid must be brought before the court through the record. Ibid. 77.

REPEAL BY IMPLICATION.

5. *Not favored.* A repeal of a law by implication is not favored; to resort to this, the repugnance between the statutes must be so clear and plain that they cannot be reconciled. *Hume et al.* v. *Gossett*, 297.

CONSTRUCTION OF STATUTES.

6. *General rules.* In construing a statute, it is a well settled rule, that the old law must be considered; the mischiefs, inconveniences or hardships produced by it, and then, the remedy proposed by the amendatory law. *The People ex rel. Livergood* v. *Greer*, 213.

STATUTES CONSTRUED.

7. Act of 1861, in relation to married women, construed in *Farrell* v. *Patterson*, 52, and *Streeter* v. *Streeter*, 157. See MARRIED WOMEN, 1 to 6.

8. Section two of the statute of wills, in regard to the character of witnesses who may testify on presenting a will for probate, construed in *Andrews et al.* v. *Black et al.* 256. See WILLS, 17, 18, 19.

9. Act of February 25, 1845, in regard to the same subject, on an appeal. Ibid. 256. See WILLS, 20.

10. Act of 1865, exempting school directors from working on the road, does not exempt them from a road tax. *McDonald* v. *County of Madison*, 22. See TAXES, 9, 10.

11. Statute in relation to issuing execution upon a judgment after the defendant therein has died, construed in *Littler* v. *The People ex rel. Hargadine*, 189. See EXECUTIONS, 1.

12. Act of 1861, concerning insolvent debtors, construed in *The People ex rel. Livergood* v. *Greer*, 214. See INSOLVENT DEBTORS, 3.

13. Act of 1865, in relation to notice to quit, construed in *Ball* v. *Peck*, 482. See FORCIBLE ENTRY AND DETAINER, 3, 4.

STATUTES. STATUTES CONSTRUED. *Continued.*

14. The 29th section of the chapter of the Revised Statutes entitled "Courts," in reference to amount required to authorize an injunction, construed in *Breckenridge* v. *McCormick et al.* 491. See INJUNCTIONS, 1.

15. The 7th section of chapter Revised Statutes, entitled "Fees and Salaries," and 9th section of chapter entitled "Practice," in regard to the fee chargeable by a clerk of a Circuit Court for entering a suit on the docket, construed in *Kerp* v. *Fuchs*, 492. See FEES, 1.

16. The 138th section of the statute of wills, in regard to the right of appeal from an order of the probate court, admitting, or refusing to admit, a will to probate, construed in *Andrews et al.* v. *Black et al.* 256. See APPEALS, 3.

17. Charter of St. Louis, Jacksonville and Chicago Railroad company, as to the extent of the grant therein of lands owned by the State, construed in *St. Louis, Jacksonville and Chicago R. R. Co.* v. *Trustees, etc., Institution for the Blind*, 303. See GRANT, 1, 2, 3.

18. Section 46 of the ractice act, in relation to a stay of proceedings out of term time, by order of the judge, construed in *Bonnell* v. *Neely*, 288. See PRACTICE, 7, 8, 9.

19. Act of February 7, 1865, authorizing certain counties to levy a tax to pay bounties to soldiers, construed in *Briscoe et al.* v. *Allison et al.* 291. See TAXES, etc. 7, 8.

20. Section 7 of the township organization law of 1861, as to lien of town collector's bond, construed in *Hume et al.* v. *Gossett*, 297. See HOMESTEAD, 9, 10, 11.

21. Section 7 of the chapter of the Revised Statutes, entitled "Evidence and Depositions," in reference to the pleading and evidence in actions *ex contractu*, where there are several plaintiffs, construed in *Snell* v. *De Land et al.* 323. See PLEADING AND EVIDENCE, 10.

22. Meaning of the phrase "next of kin," as used in the act of 1853, authorizing an action to be brought for the use of the widow or next of kin, where a person's death has been caused by the wrongful act, neglect or default of another. *Chicago and Alton Railroad Co.* v. *Shannon, Admr.* 339. See NEXT OF KIN.

23. Meaning of the phrase "usual stopping place," in the statute which declares at what place passengers may be expelled from a railroad car. *Chicago and Alton Railroad Co.* v. *Flagg*, 364. See RAILROADS, 16, 17.

24. Act of February 2, 1865, authorizing the county of Livingston, and other counties, to levy a tax to pay bounties to volunteers for the army, construed in *The State* v. *Sullivan*, 412. See TAXES AND TAX TITLES, 3

25. Township organization law of 1861, in relation to the equalization of assessments between townships, construed in *The State* v. *Allen*, 456. See TAXES, etc. 24.

26. The statute in relation to apportioning the costs on appeals from justices, construed in *Beckman et al.* v. *Kreamer et al.* 447. See COSTS, 1.

STAY OF PROCEEDINGS.

OUT OF TERM TIME — BY ORDER OF A JUDGE. See PRACTICE, 7, 8, 9.

STIPULATIONS. See PRACTICE, 5, 6.

STOCK RUNNING AT LARGE. See LIVE STOCK.

STRICT FORECLOSURE. See MORTGAGES, 10.

SUBROGATION.

REDEMPTION BY A JUDGMENT CREDITOR.

The creditor redeeming subrogated to the rights of purchaser redeemed from. See REDEMPTION, 1, 2.

SUBSCRIPTION.

WHEN BINDING.

1. *In writing.* A subscription paper is evidence to all who see it, that the persons whose names appear upon it as subscribers, have promised to pay the amounts set opposite their respective names. *Mc Clure* v. *Wilson*, 356.

2. Where several persons signed a subscription paper, whereby each one agreed to pay the sum set opposite his name, for the purpose of procuring substitutes for the relief of the drafted men of a certain township, and such substitutes were furnished by one of the subscribers, by means of money advanced and borrowed by him upon the faith of such subscriptions, — such person so advancing the money may maintain his action against any subscriber who neglects or refuses to pay his subscription. Ibid. 356.

3. *Of a verbal promise.* When a person, at a public meeting, held for the purpose of raising money to procure substitutes for the drafted men of the district, verbally declared, that he would give $400 for such purpose, such declaration constitutes a binding promise on his part to pay such sum to any person who accomplishes the object. Ibid. 356.

WHO MAY RECOVER.

4. *Upon a subscription.* In such case, the party advancing the money, upon the faith of the subscriptions, becomes a proper promisee, or payee. Ibid. 356.

TAXATION TO REFUND SUBSCRIPTIONS.

5. *Where money has been raised by subscription, to pay bounties to soldiers, in anticipation of a tax.* See TAXES AND TAX TITLES, 3, 4, 5.

SURETY.

RELEASE — EXTENSION OF TIME TO PRINCIPAL.

1. *Extent of liability of surety.* The general rule is, that the undertakings of a surety are not to be extended beyond the fair scope of the terms expressed, but are to be strictly interpreted. *The Governor, for the use of Thomas*, v. *Lagow et al.* 134.

2. *Extension of time to the principal — how far it operates to release the sureties.* So, where by an act of the legislature, assignees were appointed to wind up the affairs of the bank of Illinois, at Shawneetown, and were required to give bond, and allowed four years in which to discharge the duties assigned them under the act, and the time of final settlement was,

SURETY. RELEASE — EXTENSION OF TIME TO PRINCIPAL. *Continued.*

by the legislature, afterward extended two years, it was *held*, that this extension of the time without the assent of the sureties, operated as a discharge, and that the sureties could not be held liable for the acts of their principal after the expiration of the four years. *The Governor, for the use of Thomas*, v. *Lagow et al.* 134.

3. But, where by the act appointing the assignees, it was made their duty to meet at the bank on a day named in each year, to cancel and burn all notes and certificates of indebtedness redeemed and canceled, and make report to the governor of the amount of assets remaining in their hands, and of the notes and certificates canceled; and where a decree in the United States Circuit Court required such assignees to account and pay over to a trustee appointed, the amount found to be due from them as assignees, and the assignees neglected and failed to perform any of said duties, it was *held*, that the sureties of the assignees were liable for the amounts shown to have been by the assignees received and not paid over, during the four years. It was competent for the sureties to have discharged the liabilities and to have had recourse upon their principals. Ibid. 134.

WHEN SECURITY PAYS THE DEBT.

4. *Of his relative rights as a creditor.* Where a security for a firm pays the debt, he becomes the creditor of the firm, and is entitled to no greater rights than any other simple contract creditor of the same firm. *McConnel* v. *Dickson et al.* 99.

SWORN ANSWERS IN CHANCERY. See CHANCERY, 22.

TAXES AND TAX TITLES.

TAXATION TO PAY SOLDIERS' BOUNTIES.

1. *Constitutionality.* A law authorizing the levy of a town tax to raise a fund to procure volunteers and substitutes for the United States army, to exempt the town from a draft, is constitutional. *Misner et al.* v. *Bullard*, 470.

2. An act of the general assembly authorizing a county to give bounties, and to levy a tax for their payment, to induce persons to enlist in the military service, to avoid a pending draft, is held to be constitutional. *Briscoe et al.* v. *Allison et al.* 291.

3. *Refunding money paid by subscription, in anticipation of the levy of the tax.* Where, under an act of the legislature authorizing the levy of a tax to pay bounties to volunteers, a fund was raised for such purpose, by subscription, on the faith, that the money thus advanced would be refunded by the levy of the authorized tax, and by means of such subscription the requisite number of volunteers were obtained, and such tax was subsequently voted, — *held*, that by this law an implied power was given to levy and collect a tax to refund money advanced by individuals after the passage of the act, on the faith of the expected tax, and which was used for the very purpose contemplated as the object of such tax. *The State* v. *Sullivan*, 412.

4. The act of January 18, 1865, authorizing the county of Kendall, and other counties, to levy a tax to pay or discharge any indebtedness incurred

TAXES AND TAX TITLE

TAXATION TO PAY SOLDIERS' BOUNTIES. *Continued.*

by persons on account of local bounties paid or agreed to be paid by such persons, to volunteers who had or might thereafter enlist and be mustered into the service, and be credited to the town, gave authority to levy a tax for the purpose of refunding money paid by individuals, for the purpose mentioned, upon a subscription made after the law was passed, and in anticipation of the tax, such claims being properly audited, as required by the act. *Misner et al* v. *Bullard*, 471.

5. *Mode of levying such tax.* The Constitution does not prescribe the mode of levying such a tax, leaving that to be done by the legislature; and it is a proper exercise of legislative power, in that regard, to authorize the boards of supervisors of the respective counties ultimately to make the levy, after the claims should be audited by the town auditors of the several towns, and their action certified to the supervisors. Ibid. 471.

6. *Power of counties, with and without statutory authority.* Where a county offered a bounty to persons who might volunteer, be drafted, or furnish substitutes for the military service, who should be received and credited to some town in the county, whose *quota* was not full, in the absence of statutory authority to do so, such act is unauthorized and void. *Briscoe et al.* v. *Allison et al.* 291.

7. The act of February 7, 1865, authorizing the county of Clark, and some other counties, to levy a tax to pay bounties to persons who might enlist in the military service of the United States during the then existing rebellion, was prospective in its operation, and did not authorize those counties to pay bounties to those who had enlisted or been drafted before the passage of the law. Ibid. 291.

8. But the power of the counties, under the act, was not restricted to giving bounties to persons enlisting after the county authorities might take action under the law, — they were authorized to pay bounties to any who may have enlisted between the time of the passage of the act and the time that the county authorities might determine to whom they would pay bounties. Ibid. 291.

ROAD TAX.

9. *A school director not exempt.* The law exempting a director of schools from working on the public highways does not exempt him from the payment of road taxes assessed upon his personal property. Such an exemption is neither in the letter nor spirit of the act. Road labor is not a tax, nor can road labor be construed to embrace road taxes. *McDonald* v. *County of Madison*, 22.

10. *Road tax discharged in labor.* It is the duty of the supervisor of roads to notify each person residing in his district of the amount he may discharge in road labor, and to notify him of the time and place to attend to work out his tax and the kind of tools he shall bring. But the tax payer may waive the notice, either expressly, or by acts, from which the waiver may be inferred. Until he has such notice, he is not liable to be called upon to pay the tax in money. Ibid. 22.

TAXES AND TAX TITLES. *Continued.*

OF AN ILLEGAL TAX.

11. *Where a tax is illegal, in part only.* A township authorized by law to levy a tax of three per cent for bounty purposes, exceeded its power by levying five per cent. The county clerk rejected the two per cent in excess, and extended a tax of three per cent on the collector's book. *Held*, that the action of the township in exceeding its authority did not vitiate the legal tax of three per cent. The action of the county clerk was sustained. *The State* v. *Allen*, 456.

12. Where township authorities, at their regular town meeting, voted a bounty tax for three consecutive years, having only the power to vote it for one year, the tax for the year authorized would be legal, although the tax for the other two years may be otherwise. Ibid. 456.

NATIONAL BANKS.

13. *Exempt from State taxation.* The action of a board of supervisors, in abating taxes levied under the laws of this State, upon shares of stock in national banks, will be affirmed by this court, in accordance with the decision of the Supreme Court of the United States in the case of *Bradley* v. *The People of the State of Illinois*, 4 Wallace, 457.* *The People* v. *McCall et al.* 286.

TAX RECEIPTS.

14. *Their requisites.* A tax receipt which simply shows, that "dollars" were received, and fails to state that, whatever amount was received was in full of the taxes assessed, and there is no character opposite the figures to indicate what they are designed to represent, is fatally defective. *Cook* v. *Norton et al.* 391.

15. A tax receipt, exhibited by a party claiming under the seven years limitation act, which simply names the year for which the taxes were paid, without giving the day or month when it was given, is sufficient as showing the payment of the taxes assessed for that year, it being one of the seven years relied upon to complete the bar of the statute. Ibid. 391.

16. And where such receipt showed assessments upon several tracts of land, the amount assessed to each being carried out into a common column, and the character denoting "dollars," is prefixed to the first amount stated in the column, it must be understood as intended to be repeated as to each amount; and, although such receipt fails to give the sum paid, but simply states that "dollars" were received in full for the taxes of that year, it is sufficient as evidence showing payment, the "dollar" mark being prefixed to the sum stated at the foot of the column showing the gross sum assessed upon all of the tracts, and such sum being equal to the sum obtained by adding together the figures given in the column headed "total." Ibid. 391.

* NOTE BY THE REPORTER. After this decision was rendered, the legislature was called together by the governor, for the purpose, among others, of enacting a law under which capital invested in national banks might be taxed. See Gross' Stat. 576, 612. Act June 13, 1867, Sess. Acts of Special Sessions, p. 6.

TAXES AND TAX TITLES. *Continued.*

TAX RECEIPTS — COLOR OF TITLE.

17. *A tax receipt may be explained, on the question for whom the tax was paid.* See LIMITATIONS, 4.

REVISING ASSESSMENTS.

18. *Majority of board of revisors sufficient.* Where the assessor and town clerk met and duly organized the board for the purpose of reviewing the assessments, and no person appeared before them to object, their action is valid. The law expressly authorizes a majority of the board to reduce an assessment. *The State* v. *Sullivan*, 412.

19. *Right of objection — when not exercised — when will not invalidate proceedings.* And even if a person would have the right to appear before them and object to final action without the presence of the supervisor, yet the entire collection of taxes cannot be arrested, because of the absence of this member, it appearing, that the other two members met and duly organized and no one appeared to complain of the assessment. Ibid. 412.

20. *Power of the assessor — notice to the owner.* When a party liable to taxes makes out and delivers to the assessor a list of his taxable property which is accepted by the assessor, without question, that officer has no power afterward arbitrarily, and of his own motion, to alter it, without first giving the party assessed notice. *Cleghorn* v. *Postlewaite et al.* 428.

21. *Remedy of the party injured, by injunction.* See INJUNCTIONS, 8.

EQUALIZATION OF ASSESSMENTS.

22. *As between townships — of the mode thereof.* In equalizing assessments as between townships of a county, the board of supervisors are only authorized to increase or diminish the aggregate valuation of real estate, by adding or deducting such sum upon the hundred *dollars*, as may in their opinion, be necessary to produce a just relation between all the valuations of real estate in the county. *The State* v. *Allen*, 456.

23. A board of supervisors are not authorized by law to add a certain sum to each acre of land in a township, in equalizing the assessments of real estate as between the townships of a county. Equalization must be by valuation. Ibid. 456.

24. *Construction of the statute.* In the 15th section of the 16th article of the township organization law of 1861, providing for the equalization of assessments between towns, the word "dollars" should be inserted after the word "hundred," so as to show the equalization must be by valuation. Ibid. 456.

25. *Effect of improper action by the supervisors.* If a board of supervisors act illegally in changing assessments of real estate, it will not vitiate, alter or change the legal acts of the assessors of the towns. Until legally changed or vacated, their assessments are binding on the tax-payers. Ibid. 456.

COUNTY TAX — WHAT CONSTITUTES.

Tax to pay bounties to volunteers. See COUNTY TREASURER, 1.

PAYMENT BY AGENT.

Is good in support of color of title. See LIMITATIONS, 5.

TAXES AND TAX TITLES. *Continued.*

RESTRAINING COLLECTION OF TAXES.

By injunction. See INJUNCTIONS, 8, 9.

TENANTS IN COMMON.

OF PAROL PARTITION BETWEEN THEM. See PARTITION, 2, 3.

TENDER.

FORMAL TENDER — WHEN WAIVED.

By a refusal to take the kind of funds offered. Where a debtor went to the house of his creditor and offered to pay him in legal tender notes, the latter, by declaring he would take nothing but gold or silver, waived a formal tender of the notes. *Hanna* v. *Ratekin*, 462.

OF PAYMENT IN NEGOTIABLE PAPER.

Whether there must be an offer to return such paper before action brought upon the original consideration. See PAYMENT, 2 to 6.

TIME.

COMPUTATION OF TIME.

Under the pre-emption laws. See PRE-EMPTION, 5, 6.

TITLE.

OF JUDICIAL SALES.

Character of title of purchaser during the period of redemption. See SALES, 2, 3, 4.

SUBSEQUENTLY ACQUIRED TITLE.

Of chattels — whether it will inure to the benefit of the purchaser. See VENDOR AND PURCHASER, 3.

TORT-FEASORS.

IMPRISONMENT.

To what classes of tort-feasors the rights of insolvent debtors are extended by act of 1861. See INSOLVENT DEBTORS, 3.

TOWNS.

LIVE STOCK RUNNING AT LARGE.

Powers of towns to prohibit the same. See LIVE STOCK.

TOWNS AND CITIES. See CORPORATIONS, 4 to 8.

TOWN COLLECTOR'S BOND.

WHETHER A LIEN ON HOMESTEAD. See HOMESTEAD, 9, 10, 11.

TOWN ORDINANCE.

ITS REQUISITES.

Must declare a penalty. See ORDINANCE, 1.

TRESPASS.

WHEN THE ACTION WILL LIE.

For entering upon the land of another to fish. See FISHERY, 2.

BY LIVE STOCK RUNNING AT LARGE.

When an action will lie therefor. See LIVE STOCK, 4.

TRESPASS AGAINST SEVERAL.

Of several damages against them. See VERDICT, 2.

TRIAL OF RIGHT OF PROPERTY.

APPEALS THEREFROM. See APPEALS, 1, 2.

TRUSTS AND TRUSTEES.

DUTY OF TRUSTEES.

1. *To protect the beneficiaries.* The title to trust property vests in the trustees for the use of the beneficiaries, and the law empowers them, and imposes it on them as a duty, to use all reasonable and lawful means to execute the trust reposed in them. And, where the right of property is invaded, and its enjoyment by the beneficiaries is prevented, it is their duty to employ all legal means to protect the beneficiaries in its enjoyment. *Trustees of First Congregational Church* v. *Stewart*, 81. See CHURCHES AND CHURCH PROPERTY.

TRUSTEES PURCHASING AT THEIR OWN SALE.

2. *Not allowable.* SEE ADMINISTRATION OF ESTATES, 1, 2 3.

LIMITATION AS TO TRUSTS.

3. *How far applicable.* See LIMITATIONS, 1, 2.

VACATING JUDGMENTS.

AFTER THE TERM.

Not allowable. See JUDGMENTS, 1.

VARIANCE.

IN ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1 to 10.

VENDOR AND PURCHASER.

RELATION OF TRUST AND CONFIDENCE.

1. *When a purchaser is bound to disclose facts.* The mere fact, that a purchaser is the son-in-law of the grantor does not constitute the purchaser a trustee of the vendor. And when it appears, that the vendor and vendee while on friendly terms were not intimate, and when the purchaser had not acted as the agent or business adviser, and it does not appear, that the vendor said any thing which implied that she relied upon the vendee to act as her agent in the matter, it will not be presumed, that such confidence was reposed as required the purchaser to disclose the fact, that he had superior knowledge of the value of the property, or that he was authorized by the remaindermen to offer more than he gave for the life estate of the vendor in the property. *Cleland* v. *Fish et al.* 282.

OF RIGHTS SUBSEQUENTLY ACQUIRED BY GRANTOR

2. *Whether they inure to the benefit of the grantee.* Where a deed conveys a factory, located on a stream which supplies it with water, with the land on which it stands, "together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining," the grantor is not thereby inhibited from acquiring future rights in the stream. *Bliss et al.* v. *Kennedy et al.* 68.

3. *Of chattels — whether it will inure to the benefit of the purchaser.* Where a vendor sold chattels, which, at the time of such sale, he had no title to, but afterward acquired the title, and without having paid any new consideration therefor, he cannot, by virtue of such subsequently acquired title, defeat the sale to his vendee. *Fowles* v. *Vallandigham*, 269.

PURCHASER OF HOMESTEAD PREMISES.

4. *Where there is no release of the homestead right.* See HOMESTEAD, 2, 3.

VENUE.

CHANGE OF VENUE.

1. *Jurisdiction acquired thereby.* Where the venue of a cause has been changed once, and a second change of venue is taken by consent of parties, the court to which the cause is finally removed, acquires jurisdiction of the persons of the defendants, they being in court and consenting to the change of venue. *Radcliff et al.* v. *Noyes*, 318.

2. *After opening a decree*, rendered upon constructive notice, only, and the defendant has answered, it is not error for the court, on its own motion, to change the venue to another circuit, he having been counsel in the cause. And the court to which the cause is sent thereby obtains complete jurisdiction over the persons of the plaintiffs to the original suit, *Bruen et al.* v. *Bruen et al.* 408.

VERDICT.

IN DEBT ON REPLEVIN BOND.

1. *Informality will not vitiate.* A default having been entered in an action of debt on a replevin bond, a jury was called to assess the damages, who returned a verdict for the debt, and found the defendants guilty. This was informal, but as the damages were properly assessed and justice had been done, it was held the informality should not vitiate the verdict. *Bates et al.* v. *Williams*, 494.

IN TRESPASS AGAINST SEVERAL.

2. *Damages cannot be assessed severally against them.* In an action of trespass against several defendants, the jury cannot assess damages severally against them. *St. Louis, Alton and Terre Haute Railroad Co.* v. *South*, 177.

WATER-COURSES.

WHERE THERE ARE SEVERAL PROPRIETORS.

Where two persons have a right to erect a dam and mill upon a water-course, the upper proprietor is bound so to use the water as not to injure the servient proprietor lower down the stream, while, at the same time, the latter is bound so to construct his dam and works that the water stopped by them shall not flow back on the works of the upper proprietor, or otherwise do him an injury. *Rudd* v. *Williams*, 387. See RIPARIAN RIGHTS.

WILLS.

POWER OF DISPOSITION OF ESTATE.

1. *By deed or will.* The owner of property has the legal right to dispose of it as he may choose, and may distribute it among his children during his life, instead of by will, and if in doing so, he makes a part of his heirs the recipients of his bounty beyond others, the remaining heirs have no legal right to complain. *Clearwater et al.* v. *Kimler et al.* 273.

2. *By will.* Under our statute, the power of the testator to dispose of his estate is unlimited, both as to person and object. *Rhoads, Exr.*, v. *Rhoads et al.* 240.

3. *Testator may pass by his children.* A testator of sound mind may pass by his own children, in making a testamentary disposition of his estate. Ibid. 240.

WILLS. POWER OF DISPOSITION OF ESTATE. *Continued.*

4. *Perpetuity not allowed.* The law abhors every disposition of property which savors of a perpetuity. *Rhoads, Exr.*, v. *Rhoads et al.* 240.

5. *Time and mode of enjoyment.* But a testator may prescribe the time and mode in which the bounty shall be enjoyed, provided, that in so doing, he contravenes no well recognized and admitted principle of public policy, or rule of right. Ibid. 240.

6. An executory limitation to a life, or any number of lives, and twenty-one years afterward, is valid. Ibid. 240.

7. Where a testator disposed of his whole estate, devising it to executors in trust for all of his children, one-half of whom at the time of his death were adults, the proceeds of the estate to be invested and re-invested in government bonds, and at the expiration of fifteen years after the testator's death, the estate, with its accumulations, to be divided equally among them; *held*, that such disposition was clearly within the testamentary power. Ibid. 240.

8. Such a will being one the testator had the power to make, it will not be disturbed; and devisees under it, can only come into the enjoyment of their respective shares in the mode prescribed by the will. Ibid. 240.

ANTICIPATING TIME OF PAYMENT.

9. *To what extent allowable.* In such a case, a court of chancery, on a proper case being made out, has the power to order the trustee to anticipate the time of payment under the will, so far as it may be necessary for the maintenance of the devisees; but its power extends no further. And such action in no wise tends to subvert the will, the court having the power to do, what it is evident from the will, that the testator would do, if he were living. Ibid. 240.

PROOF OF SIGNING BY TESTATOR.

10. *What is sufficient — in a proceeding to contest a will.* All that the statute requires in the execution of a will is, that the testator shall either sign the will in the presence of the witness, or acknowledge his signature to him; and therefore, in a contest as to the validity of an alleged will, the testimony of one of the subscribing witnesses, that the testator either signed the will in his presence, or acknowledged his signature to him, but he could not remember which, was properly allowed to go to the jury. *Brownfield et al.* v. *Brownfield et al.* 148.

OF UNDUE INFLUENCE UPON TESTATOR.

11. *Of proper evidence in that regard.* Where the questions at issue were the manner of the execution of a will, and the influences which led to it, it appears that the exclusion of evidence showing the employment of fraud or undue influence would be error. Ibid. 147.

12. But in such a case it was not error to exclude evidence showing only that the testator, in his ordinary affairs, acted under the advice of the devisee, and was even influenced by that advice, since that alone would not tend to prove that he used undue influence in procuring the execution of the will. Ibid. 147.

WILLS. *Continued.*

MENTAL CAPACITY OF TESTATOR.

13. *Of proper evidence on that subject.* Nor is it error, in such a case, to admit oral evidence in reference to testator's not holding an equitable title to lands which he was devising. On the question of mental capacity it tended to show that his memory was good, that his sense of justice was unimpaired, that his judgment as to the best means of preventing subsequent litigation with those holding the equitable title was sound. *Brownfield et al.* v. *Brownfield et al.* 147.

PRESUMPTIONS IN FAVOR OF A WILL.

14. The law presumes that a will properly executed and attested, is valid, until the presumption is overcome by clear and satisfactory proof. And where the testator was shown to be a man of more than ordinary degree of force of character, and there was no diminution of capacity up to the time of his making the will, and no improper act by the devisee was shown, a finding by the jury in favor of the validity of the will was not disturbed. Ibid. 148.

MUST BE PROPERLY AUTHENTICATED.

15. *To be admitted in evidence.* If a will is not properly authenticated, it is not admissible for any purpose as evidence in a case. *Farrell* v. *Patterson*, 52.

APPLICATION TO ADMIT A WILL TO PROBATE.

16. *An appeal will lie* to the Circuit Court from an order of the probate court, admitting or refusing to admit a will to probate. *Andrews et al.* v. *Black et al.* 256.

17. *What witnesses may testify.* Section two of the statute of wills, directs what testimony to be made by subscribing witnesses, shall be sufficient to admit a will to record; provided, no proof be shown of fraud, compulsion, or improper conduct. The first proof is confined to subscribing witnesses, but the testimony of other persons, not otherwise disqualified, is competent on the matters named in the proviso. Ibid. 256.

18. On an appeal from the probate court, in relation to the probate of a will, where probate has been allowed, no other evidence can be heard on the trial, upon the question of the testator's sanity, than that of the subscribing witnesses. Ibid. 256.

19. The cases of *Walker* v. *Walker*, 2 Scam. 291, and *Duncan* v. *Duncan*, 23 Ill. 365, are not in conflict with this rule. Ibid. 256.

20. Under the act of February 25, 1845, on appeal, other evidence than that of the subscribing witnesses, can be heard on the question of the testator's sanity, in cases where probate of the will has been refused. Ibid. 256.

PROCEEDING TO CONTEST A WILL.

21. *Of the evidence allowable.* In cases where probate has been allowed, all persons interested, may, within five years after probate, under the 6th section of the statute of wills contest the validity of such will, and in this proceeding, the sanity of the testator, or any other proper question, may be raised and heard upon any legitimate evidence. But where probate

WILLS. PROCEEDING TO CONTEST A WILL. *Continued.*

has been refused, no proceedings of this character can be resorted to *Andrews et al.* v. *Black et al.* 256.

22. The act of 1845 recognizes the construction adopted in the case of *Walker* v. *Walker*, 2 Scam. 291, leaving the rule to stand as decided in that case, where probate had been allowed. Ibid. 257.

WITNESS.

COMPETENCY.

1. *Interest.* A person interested in establishing a liability whereby he is to be benefited cannot be a witness in that regard. He cannot be permitted to do indirectly what the law forbids to be done directly. *Frink* v. *The People, for use, etc.* 27.

2. So in an action against a county treasurer, upon his official bond, the county collector, who was a defaulter as such, is not a competent witness on the part of the plaintiff to prove what moneys he had paid to the treasurer. It was the interest of the collector to increase the amount of the judgment against the treasurer, and thus reduce his own liability. Ibid. 27.

3. When a person having trust property in his hands misapplies any portion of it, he is liable to account for such misappropriation, and to that extent is interested in defeating the trust, and such trustee is incompetent as a witness, by whom to show the purposes for which the trust was created. *Heartrunft et al.* v. *Daniels et al.* 369.

4. *Interest — assignor of a note.* An indorser is not a competent witness to impeach the validity of a note which he has assigned. *Walters* v. *Witherell*, 388.

5. *Former decisions.* The cases of *Webster* v. *Vickers*, 2 Scam. 295, and *Bradley* v. *Morris*, 3 id. 183, do not conflict with the above rule. Ibid. 388.

What witnesses may testify on an application to admit a will to probate, and on appeal to the Circuit Court. See WILLS, 17, 18, 19.

PRIVILEGED COMMUNICATIONS.

As between attorney and client. See ATTORNEY AT LAW, 3.

WORDS.

MEANING OF CERTAIN WORDS.

"*Immediately*," "*practicable.*" See CONTRACTS, 7, 8.

"*Banker*," "*money-changer.*" See BANKS AND BANKERS, 1.

"*Next of kin.*" See that title, *ante.*

"*Usual stopping place.*" See RAILROADS, 16, 17.

WRIT OF ERROR CORAM NOBIS.

NOT IN USE IN THIS STATE

This writ has never been in use in this State, and it has fallen into desuetude even in England. Its place is supplied by motion in the court where, and during the term when, the error in fact occurs. *McKindley et al.* v. *Black et al.* 488.

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